Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

Ray Van Alstine, dba Palm Desert Mobile Estates,
Petitioner and Appellant,

v.

The City of Palm Desert and
the Palm Desert Rent Review Board,
Respondents and Appellees.

The Tenants Residing at Palm Desert Mobile Estates
Real Parties in Interest.

On Petition for Writ of Certiorari
to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

NUMBER ONE. UNDER THE CITY OF PALM DESERT'S RENT CONTROL REGULATIONS IT IS "PRESUMED" THAT ADJUSTING A LANDLORD'S 1982 NET OPERATING INCOME BY 50% OF THE INCREASE IN THE INFLATION RATE WILL RESULT IN A "FAIR RETURN" IN ALL FUTURE YEARS. IS SUCH AN EVIDENTIARY PRESUMPTION SO ARBITRARY THAT IF VIOLATES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION?

NUMBER TWO: DOES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION PROHIBIT AN ADMINISTRATIVE AGENCY (OR A REVIEWING COURT) FROM REJECTING UNCONTRADICTED AND UNIMPEACHED EXPERT TESTIMONY REGARDING RATES OF RETURN ON INVESTMENT IN A PRICE REGULATED INDUSTRY, OR FROM UNILATERALLY ESTABLISHING A RATE OF RETURN THAT IS NOT SUPPORTED BY ANY EXPERT TESTIMONY?

LIST OF PARTIES

The Petitioner is Plaintiff and Appellant Ray Van Alstine, dba Palm Desert Mobile Estates. The Petitioner is represented by Anthony C. Rodriguez of the Law Office of Anthony C. Rodriguez, 1425 Leimert Boulevard, Suite 101, Oakland, California 94602.

The Respondents are the City of Palm Desert and the Palm Desert Rent Review Board, represented by Douglas S. Phillips of Best, Best & Krieger, 74-760 Highway 111, Suite 200, Indian Wells, California 92210.

The Real Parties in Interest are the Tenants residing at Palm Desert Mobile Estates, represented by Charles A. Prawdzik of the Law Office of Charles A. Prawdzik, 1612 Preston Park Drive, Henderson, Nevada 89052.

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PETITION FOR A WRIT OF CERTIORARI TO REVIEW AN ORDER OF THE CALIFORNIA SUPREME COURT DENYING DISCRETIONARY REVIEW OF THE JUDGMENT OF THE FOURTH DISTRICT COURT OF APPEAL

Petitioner Ray Van Alstine, dba Palm Desert Mobile Estates prays for a writ of certiorari to review an order of the California Supreme Court declining to review the judgment of the Fourth District Court of Appeal of the State of California.

OPINIONS BELOW

The June 18, 2003 order of the California Supreme Court declining discretionary review is included in the Appendix to this petition, at page A-1. The March 14, 2003 decision of the Fourth District Court of Appeal denying the Petitioner a rent increase is included in the Appendix to this petition, at pages A-2 through A-26. The March 13, 2002 judgment of the Riverside County Superior Court denying the Petitioner a rent increase is included in the Appendix to this petition at pages A-28 through A-32. The January 28, 2000 decision of the Palm Desert Rent Review Board denying the Petitioner a rent increase is included in the Appendix to this petition at pages A-33 through A-74.

JURISDICTION

The California Supreme Court denied the petition for review on June 18, 2003. This Petition for a Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this court to review the denial of the California Supreme Court's Petition for Review is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the due process clauses of the fifth and fourteenth amendments to the United States Constitution. The fifth amendment provides in relevant part as follows:

> "No person shall . . . be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation."

The fourteenth amendment provides in relevant part as follows:

> "...Nor shall any State deprive any person of . . . property, without due process of law."

This case also involves Regulations 101(A) and 101(B) to the City of Palm Desert's mobilehome rent control ordinance. Those regulations are set forth at pages A-75 through A-77 of the Appendix filed herewith.

STATEMENT OF THE CASE

Palm Desert Mobile Estates is a 144 space mobilehome park located in Palm Desert, California. (AR 70).[1] It is owned by Mr. and Mrs. Ray Van Alstine. The Van Alstines purchased the park on July 24, 1978 for $1,550,000. (AR 72). At that time, there was no rent control in the City of Palm Desert. (AR 154-180).

In 1982, the City of Palm Desert enacted rent control for all mobilehome parks within the City limits, including Palm Desert Mobile Estates. (AR 154-180). Mr. Van Alstine's tax returns demonstrate that the park operated at a "loss" each and every year between 1978 and 1982, including a $69,314 "loss" in 1982. (AR 187, line 26; AR 188, line 26; AR 189, line 34; AR 190, line 33 and AR 191, line 32). During those same years, lower risk treasury bonds were generating returns ranging from 8.18% to 14.68%. (AR 868-869).

In 1996 the Van Alstines invested an additional $702,060 in the park, including the installation of a new sewer system and the

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[1] All references to "AR" are to the Administrative Record from the underlying administrative proceedings before the City of Palm Desert. All references to "CT" are to the Clerk's Transcript on Appeal and all references to "RT" are to the Reporter's Transcript on Appeal.

construction of new roads. (AR 248, 249-266). Because the park did not generate sufficient income to enable them to pay cash for those projects, they borrowed that money. Under the terms of the loan, Mr. Van Alstine had to pledge the park as security. (AR 793).

Between 1978 and 1997 the Van Alstines were also exposed to increases in the consumer price index in excess of 140%. (AR 268-269 and 839). Although they were able to increase rents to account for some of those inflationary pressures, they were not able to achieve a fair return on their investment. (AR 815-864).

Sections 101(A) and (B) of the City of Palm Desert's regulations "presume" that adjusting a parkowner's 1982 or "base year" net operating income for 50% of the increase in the inflation rate will provide a fair return in all future years. (A-75). In this case, the evidence demonstrated that the Van Alstine's 1982 or "base year" net operating income was $177,752. (AR 191). The evidence also demonstrated that between December of 1982 and December of 1996 the consumer price index had increased by 63.9%, from 96.6 to 158.3. (AR 268). Therefore, the maximum net operating income the Van Alstines were entitled to under the "presumption" in the City's regulations was $234,508. ($177,725 x 1.3195 = $234,508).

Under Section 101(B) of the regulations, parkowners are also entitled to rebut the above "presumption," by demonstrating that it does not result in a "fair return." (A-75). However, Section 101(B) also states that "what constitutes a fair return on property is debatable," and therefore allows a parkowner to submit "any and all evidence or arguments" to rebut the presumption. (A-76).

On July 29, 1997, the Van Alstines applied for a $52.93 rent increase, so as to receive a fair return on their investment in the park. (AR 43-70).[2] The hearing on their application was delayed for almost two years, due to a dispute regarding the selection of the City's hearing officer. (AR 546-548, 347-545). As a result, on January 26, 1999, the Van Alstines amended their application, so as to account for the additional inflation that had occurred since 1997. (AR 1023-1027).

Hearings were held regarding the Van Alstines' amended application in April of 1999. (AR 1476 and 1839). At the hearings the Van Alstines offered the report and testimony of Dr. Richard

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[2] Because the City's regulations recognized that a return on "current fair market value" could be awarded, the Van Alstine's also noted that a $74.14 rent increase was available under that theory. (AR 60, lines 1-24; AR 50, lines 8-10; AR 59, lines 13-26; AR 69, lines 14-16).

Fabrikant, regarding rates of return on investment in mobilehome parks. (AR 815-864, at 846). Dr. Fabrikant received his MBA from The Wharton Graduate School of Finance and his Ph.D. in Economics from the University of California. Dr. Fabrikant also had substantial experience regarding rates of return in mobilehome parks, having provided expert testimony with respect to that subject on numerous occasions. (AR 1569, line 4-1572, line 5). Dr. Fabrikant began his testimony by demonstrating that the purpose of a return is to compensate an investor for the risk taken. (AR 1574, line 14-1576, line 15). As the risk inherent in an investment increases, so must the potential rate of return. (AR 826-833).

Dr. Fabrikant offered uncontradicted evidence regarding the rates of returns on various comparable investments, including mutual funds and real estate investment trusts ("REITS") that invested exclusively in mobilehome parks. (AR 1576, line 16-1588, line 16). After examining the rates of return available on such comparable investments, Dr. Fabrikant opined that a real rate of return of 10.4% was required to provide the Van Alstines with a fair return on their investment in the park. (AR 846). In order to obtain a real return of 10.4%, Dr. Fabrikant concluded that the Van Alstines required a net

operating income of at least $471,852. (AR 846).

In 1998, however, the Van Alstines' net operating income was only $371,583, or $100,269 less than the $471,852 amount necessary to provide a fair return. (AR 1026-1027). In order to receive a fair return, Dr. Fabrikant concluded that the Van Alstines required a rent increase of at least $58.03 per space per month. ($100,269 ÷ 144 spaces ÷ 12 months = $58.03 per month). (AR 846).

The tenants did not offer any expert testimony to contradict Dr. Fabrikant's expert opinion regarding the rent increases necessary to provide a fair return. In fact, the tenants' only witness was their own attorney, Charles Prawdzik. (AR 1886, lines 18-21). In addition to the fact that Mr. Prawdzik was not an expert regarding rates of return, he had no opinion as to the rate of return necessary to provide a fair return in this case. (AR 1942, line 5 through AR 1943, line 18). To the contrary, on at least three occasions Mr. Prawdzik indicated that he "agree[d] with [Dr. Fabrikant's] financial theory." (AR 1664, line 3-4; AR 1660, lines 17-19; AR 1648, lines 7-24).

At the conclusion of the administrative hearing, the hearing officer found that the Van Alstines had not rebutted the "presumption" in the City's ordinance, writing "*that the MNOI method*

provides the parkowners with a fair return." (A-72 and A-73). However, the hearing officer did not find that Dr. Fabrikant was biased. (A-35 through A-74). In addition, the hearing officer did not find that any of Dr. Fabrikant's theories had been disproved. (A-35 through A-74). To the contrary, the hearing officer indicated that other than failing to "rebut the presumption" in the City's ordinance, Dr. Fabrikant's theories were acceptable. (A-72).

On November 22, 1999, the Van Alstines appealed the hearing officer's decision to the full Rent Review Board, challenging the "presumption" in the City's ordinance and arguing that the hearing officer had deprived them of a fair return. (AR 1168-1199). However, the Board simply reaffirmed the hearing officer's decision, also finding that the Van Alstines had failed to submit sufficient evidence to rebut the "presumption" in the City's ordinance (A-33and A-34). Again, however, the Board did not analyze the theories offered by Dr. Fabrikant and made no finding that Dr. Fabrikant's opinion was biased, or otherwise improper. (A-33and A-34).

On April 5, 2000, Mr. Van Alstine appealed to the Riverside County Superior Court, raising the same issues that had been raised before the Rent Review Board. (CT Vol. 1, pgs. 1-16). On January 31,

2002, the trial court issued its ruling, also finding that the Van Alstines had failed to rebut the "presumption" in the City's ordinance. (A-27 through A-32). Again, however, the trial court did not analyze the theories offered by Dr. Fabrikant and made no finding that his opinion was biased, or otherwise improper. (A-27 through A-32). Accordingly, on May 13, 2002, Mr. Van Alstine filed an appeal with the Fourth District Court of Appeal, again rasing the same issues that had been raised before the Rent Review Board and the Superior Court. (CT Vol. 2, pgs. 358-362).

On March 14, 2003, the Court of Appeal found that Mr. Van Alstine had in fact submitted sufficient evidence to rebut the "presumption" in the City's ordinance. (A-15 through A-19). However, the Court of Appeal then found that the hearing officer *could have* rejected Dr. Fabrikant's uncontradicted expert opinion for a number of reasons, including bias and/or his failure to establish one or more material facts. (A-23). Although the hearing officer himself made ***no*** such findings regarding Dr. Fabrikant, the Court of Appeal then rejected Dr. Fabrikant's opinion and found that the 8.9% return the Van Alstines were receiving before they filed their application was a fair return. (A-23 through A-26).

On April 22, 2003, Mr. Van Alstine filed a timely petition for review with the California Supreme Court, again raising the same issues that had been before the Board and the lower courts, but also challenging the Court of Appeal's new findings that 8.9% was a fair rate of return. On June 18, 2003, the California Supreme Court denied Mr. Van Alstine's petition for review, without comment. (A-1). Because the end result of this litigation is that the California courts have concluded that uncontradicted and unimpeached expert testimony is not sufficient to establish a property owner's right to a fair return, Mr. Van Alstine has filed this petition for a writ of certiorari.

LEGAL ARGUMENTS

QUESTION NO. ONE: UNDER THE CITY OF PALM DESERT'S RENT CONTROL REGULATIONS IT IS "PRESUMED" THAT ADJUSTING A LANDLORD'S 1982 NET OPERATING INCOME BY 50% OF THE INCREASE IN THE INFLATION RATE WILL RESULT IN A "FAIR RETURN" IN ALL FUTURE YEARS. IS SUCH AN EVIDENTIARY PRESUMPTION SO ARBITRARY THAT IF VIOLATES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION?

A. THE PRESUMPTION THAT ADJUSTING BASE YEAR PROFITS FOR 50% OF THE INCREASE IN THE INFLATION RATE IS ARBITRARY AND THEREFORE VIOLATES DUE PROCESS

A "presumption" is a tool to enable fact finders to make certain conclusions in the absence of contrary evidence. Marvin v. Adams, 224 Cal. App. 3d 956, 961 (1990). However, in order to comport with due process, a "presumption" may not be based on "arbitrary" assumptions. As stated by the United States Supreme Court in Tot v. United States, 319 U. S. 463, 467-468 (1943):

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience . . . [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.

In addition to the general law regarding "presumptions," the United States Supreme Court has specifically held that any system of price controls is unconstitutional if it is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." Nebbia v. New York, 291 U.S. 502, 539 (1934).

Thus, at least one California Appellate Court has suggested in dicta that a rent control ordinance that limits increases in "base year' net operating income to 40% of the increase in the inflation rate is "arbitrary" and therefore, presumably unconstitutional. City of Berkeley v. Berkeley Rent Stabilization Board, 27 Cal. App. 4th 951, 969-970 (1994).

In this case, Sections 101(A) and (B) of the City of Palm Desert's regulations "presume" that adjusting a parkowner's 1982 net operating income for *50%* of the increase in the inflation rate will result in a fair return in all future years. (A-75). However, that *50%* figure is wholly arbitrary, as there are no findings or evidentiary support for it anywhere in the City's regulatory scheme. Because the "presumption" in the City's regulations is totally arbitrary, that presumption must be declared unconstitutional.[3]

B. THE PRESUMPTION IS ARBITRARY BECAUSE ANYTHING LESS THAN A FULL INFLATIONARY ADJUSTMENT

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3 For an example of a presumption that does not appear to violate the due process clause, see California Evidence Code Section 641 ["a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail"]. See also California Evidence Code Section 640: ["a writing is presumed to have been truly dated."]

OF BASE YEAR PROFITS WILL ULTIMATELY RESULT IN A CONFISCATORY TAKING OF PROPERTY

In Fisher v. City of Berkeley, 37 Cal. 3d 644, 683 (1984), the California Supreme Court recognized that any attempt to "freeze" a property owner's "base year" net operating income in the face of inflation will eventually result in a confiscatory taking of property. The Fisher court addressed this issue as follows:

> "Clearly, if the fixed amount of a landlord's profit remains the same year after year his return will in time diminish in real value: it is obvious that a $1,000 "profit" in 1990 will have a much lower value than the same dollar amount of profit in 1980. . . . Therefore, although Defendants' ordinance may properly restrict landlords' profits on their rental investment, it may not indefinitely freeze the dollar amount of those profits without eventually causing confiscatory results. (Id at 683).

Under Fisher, supra, it is clear that any attempt to indefinitely freeze "base year" net operating income will necessarily result in a confiscatory taking, because the "real" purchasing power of the parkowner's profit will be eroded over time. In other words, if the City simply allows the dollar amount of the parkowner's "base year"

profits to remain constant over time, the long term impact of inflation will cause the real value of those profits to decrease, eventually resulting in a return that is below the minimum level required by the constitution.

For example, assume that in 1980 a parkowner had gross income of $200,000, expenses of $120,000 and a profit of $80,000. Assume further that in 1980, $70,000 was the minimum profit necessary to provide a fair return for that particular investment. Because that parkowner's $80,000 return would have been within "the broad zone of reasonableness," such a parkowner would have no claim for the confiscatory taking of his property at that time. Permian Basin Area Rate Cases, 390 U.S. 747, 770 (1968).

If during the next 20 years the inflation rate increases by 100%, the minimum amount necessary to "maintain" that fair return will also have increased by 100%, from $70,000 to $140,000. Under the "presumption" in the City of Palm Desert's ordinance, however, such a parkowner would have been entitled to increase "base year" profits by only 50% of the increase in the inflation rate, from $80,000 to $120,000. Therefore, even though the "presumption" in the City's ordinance would have allowed a $40,000 increase in profits, the

parkowner would not only be worse off than he was in 1980, he would no longer be making a fair return.

Based on the California Supreme Court's findings in Fisher, supra, it is obvious that any attempt to "freeze" base year profits for the impact of inflation will ultimately result in the confiscatory taking of property. However, it is equally obvious that adjusting "base year" profits by any amount less than 100% of the increase in the inflation rate will ultimately achieve that same result, only over a longer period of time. In other words, whereas an ordinance that allows "base year" profits to be adjusted for 75% of the increase in the inflation rate may not result in a confiscatory taking of property for 10 or 15 years, an ordinance that allows "base year" profits to be adjusted for only 25% of the inflation rate may achieve a confiscatory taking of property in only five years. See also City of Berkeley v. Berkeley Rent Stabilization Board, 27 Cal. App. 4th 951, 968 (1994) [" . . . rent control cannot be allowed to result in a slow unconstitutional taking through the combined effects of inflation and regulatory delay . . . "].

In short, based on the reasoning in the California Supreme Court's decision in Fisher v. City of Berkeley, 37 Cal. 3d 644, 683 (1984), it is a mathematical certainty that adjusting "base year" profits

for less than 100% of the increase in the inflation rate will ultimately result in a diminution in the real value of the parkowner's profits and a confiscatory taking of property. Because it is a mathematical certainty that adjusting "base year" profits for less than 100% of the increase in the inflation rate will result in the confiscatory taking of property over time, it is completely irrational to allow local governments to "presume" such adjustments also result in a fair return. Because the "presumption" that adjusting "base year" profits for less than the full increase in the inflation rate does not "have a rationale relation to the circumstances of life as we know them," but instead can be disproved with mathematical certainty, the "presumption" in the City's ordinance is unconstitutional and must be struck down by this court. Tot v. Untied States, 319 U.S. 463, 467-468 (1943). See also Nebbia v. New York, 291 U.S. 502, 531 (1934) [price controls are unconstitutional if "arbitrary."].

C. THE VARYING PERCENTAGES USED TO "PRESUME" A FAIR RETURN IN OTHER CALIFORNIA CITIES SUPPORT THE PROPOSITION THAT THE "PRESUMPTION" IN THE CITY OF PALM DESERT'S ORDINANCE IS ARBITRARY

A review of California case law demonstrates that a number of

other rent control ordinances in the state contain provisions whereby "base year" profits may be adjusted for less than 100% of the increase in the inflation rate.[4] Those cases indicate percentage adjustments ranging from 40% of the increase in the inflation rate to 75% of the increase in the inflation rate. Those cities and the percentages mentioned in those cases are compared to the Palm Desert ordinance as follows:

City	Adjustment
1. Santa Monica	40%
2. Santa Paula	75%
3. Carpenteria	75%
4. West Hollywood	60%
5. Oceanside	40%
6. Palm Desert	50%

As the above table demonstrates, it is "presumed" that every landlord in Santa Monica and every landlord in Oceanside will receive

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[4] See Kavanau v. Santa Monica Rent Control Board, 19 Cal. 4th 761 (1997); Donahoe v. Santa Paula West Mobilehome Park, 47 Cal. App. 4th 1168 (1996); Sandpiper Mobile Village, v City of Carpenteria, 10 Cal. App. 4th 542 (1992): Abrahamson v. City of Carpenteria, 10 Cal. App. 4th 542 (1992); Oceanside Mobilehome Parkowners Association v. City of Oceanside, 157 Cal. App. 3d 887 (1984).

a fair return if their "base year" profits are adjusted by 40% of the increase in the inflation rate. By contrast, it is presumed that every property owner in Carpenteria and every property owner in Santa Paula will receive a fair return if their "base year" profits are adjusted for 75% of the increase in the inflation rate.

There is no way to rational way to explain the widely varying percentages in the ordinances in the above listed cities. To the contrary, the only conclusion that can be derived from the above listed percentages is that the ***real*** value of a landlord's "base year" profits will erode at a faster rate in Santa Monica and Oceanside than in Santa Paula and Carpenteria. Because there is no rational basis for adjusting "base year" profits by such varying amounts, the "presumptions" in each of the above ordinances, including the Palm Desert ordinance, are unconstitutional. Tot v. United States, 319 U.S. 463, 467-468 (1943); Nebbia v. New York, 291 U.S. 502, 539 (1934).

QUESTION NO. TWO: DOES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION PROHIBIT AN ADMINISTRATIVE AGENCY (OR A REVIEWING COURT) FROM REJECTING UNCONTRADICTED AND UNIMPEACHED EXPERT TESTIMONY REGARDING RATES OF RETURN ON INVESTMENT IN A PRICE REGULATED INDUSTRY, OR FROM UNILATERALLY ESTABLISHING A RATE OF RETURN THAT IS NOT SUPPORTED BY ANY EXPERT TESTIMONY?

A. PALM DESERT MOBILE ESTATES IS ENTITLED TO A JUST AND REASONABLE RETURN BASED ON THE EVIDENCE SUBMITTED AT THE ADMINISTRATIVE HEARING

The takings clause of the fifth amendment to the United States constitution prohibits the taking of private property for a public purpose, without the payment of just compensation. U. S. Const. Amend. V. The takings clause applies to the states through the due process clause of the fourteenth amendment. Webb's Fabulous Pharmacies v. Beckwith, 449 U. S. 155, 160 (1980). Originally, the takings clause applied only to the actual physical occupation of land by a governmental agency. Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419, 427, N.5 (1982). However, it has now been expanded to prohibit the taking of all types of property interests, including takings caused by the enforcement of governmental regulations that "go too far." Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415 (1922).

The takings clause and the due process clause place constitutional constraints on the ability of local governments to regulate prices, requiring that regulated prices result in a rate of return that is "just and reasonable." Duquesne Light Co. v. Barasch,

488 U. S. 299, 307-308 (1989). Thus, a local government is constitutionally prohibited from setting prices at a confiscatory rate. Federal Power Commission v. Natural Gas Pipeline, Co., 315 U.S. 575, 585-586 (1942). A confiscatory rate is one that prevents property owners from receiving a return that is "commensurate with returns on investments in other enterprises having corresponding risks." Federal Power Comm'n v. Hope Gas Co., 320 U. S. 591, 603 (1944). Of course, because rental property is a relatively risky investment, it commands a greater return than lower risk investments, such as federally insured certificates of deposit. Cotati Alliance for Better Housing v. City of Cotati, 148 Cal. App.3d. 280, 295 (1983).

Determining the rates that will provide the owners of regulated properties with a fair return "is the product of expert judgment." Federal Power Comm'n v. Hope Gas Co., 320 U.S. 591, 602 (1944). However, that "expert judgment" cannot be sustained if not supported by substantial evidence in the administrative record. As stated by the United States Supreme Court in Northern Pac. Ry. Co. v. Department of Public Works of Washington, 268 U.S. 39, 44, 45 (1925):

"But where rates found by a

> regulatory body to be compensatory are attacked as being confiscatory, courts may inquire into the method by which its conclusion was reached. An order based upon a finding made without evidence . . . or upon a finding made upon evidence which clearly does not support it . . . is an arbitrary act against which courts afford relief. The error under the discussion was of this character. It was a denial of due process."

Based on the above authority, it is clear that the appropriate rate of return on an investment such as Palm Desert Mobile Estates must be determined by expert testimony. Whispering Pines Mobilehome Park v. City of Scotts Valley, 180 Cal. App.3d 152, 160 (1986). In addition, "[a]n administrative board must accept as true the intended meaning of uncontradicted and unimpeached evidence" regarding the rate of return. Martori Brothers Distributors v. Agricultural Labor Relations Board, 29 Cal. 3d 721, 728 (1981). In other words, unless there is substantial evidence to support a "finding" rejecting unimpeached and uncontradicted testimony, it must be accepted by the administrative tribunal. As stated by the California Supreme Court in McAllister v. Workmen's Comp. App. Bd., 69 Cal. 2d 408, 413 (1968):

> "In this case, however, even the indulgence of the substantial evidence rule will not permit us to uphold the board's decision. We note at the outset that no effort was ever made – either by way of allegation or evidence – to question the honesty or competence of any of the petitioner's witnesses. Accordingly, we as the board, in view of the City's failure to introduce any contradictory evidence, must assume the accuracy of the testimony. Likewise, the meaning of the testimony, and the inferences to be drawn from it, cannot be disputed.

In this case, Dr. Fabrikant provided uncontradicted expert testimony that the minimum rate of return required to provide a return commensurate with other enterprises having corresponding risks was 10.4% (AR 846). In its decision, the Court of Appeal set forth several reasons the hearing officer "could have" given for rejecting Dr. Fabrikant's uncontradicted expert testimony, including lack of credibility or the failure to establish a material fact. (A-23). However, the hearing officer never made such findings, let alone cited "substantial evidence" to support such findings. (A-35 through A-74). To the contrary, the hearing officer found that other than the failure to rebut the "presumption" in the ordinance, there was nothing wrong with Dr. Fabrikant's theories, writing as follows:

> "This is not to say that the inflation adjusted method . . . is incorrect, or is not a way to measure a parkowner's entitlement to a rent increase." (A-72).

Again, although the hearing officer "could have" made findings regarding the "honesty or competence" of Dr. Fabrikant's testimony, the hearing officer did not do so. Because the hearing officer did not make such findings, "the meaning of [Dr. Fabrikant's] testimony, and the inferences to be drawn from it, cannot be disputed." McAllister v. Workmen's Comp. App. Bd., 69 Cal. 2d 408, 413 (1968).

Because there was no evidence anywhere in the record that an 8.19% rate of return is "commensurate with returns on investments in other enterprises having corresponding risks," the Court of Appeal's finding to that effect was not supported by any evidence at all, let alone substantial evidence. Because a decision not supported by any evidence violates due process, Mr. Van Alstine's petition must be granted and the case remanded to the administrative agency, with instructions to make "findings" consistent with the evidence.[5] See

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[5] Once a party offers evidence to rebut the presumption, "the presumption disappears" and the decision must be based

Securities and Exchange Commission v. Chenery Corp, 318 U.S. 80, 94 (1943) [administrative "action must be measured by what [the Board] did, not what it might have done."].

B. IN ADMINISTRATIVE MANDAMUS PROCEEDINGS A COURT MUST DETERMINE WHETHER THE "FINDINGS" THAT WERE ACTUALLY MADE ARE SUPPORTED BY "SUBSTANTIAL EVIDENCE"

In Securities and Exchange Commission v. Chenery Corp, 318 U.S. 80, 94 (1943), the United States Supreme Court found that proper judicial review of the decisions of administrative agencies "requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." The Chenery Corp. Court also found that an administrative "action must be measured by what [the Board] did, not by what it might have done." Id at 94. In Topanga Assn. for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 515, 516 (1974), the California Supreme Court expounded upon these principles as follows:

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solely on the evidence. Slater v. Kehoe, 38 Cal. App. 3d 819 (1974), 832, N. 12; Bonzer v. Huntington Park, 20 Cal. App. 4th 1479, 1481 (1993); Craig v. Brown & Root, Inc., 84 Cal. App. 4th 416, 421 (2000).

> "[I]mplicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. . . . Reference, in section 1094.5, to the reviewing court's duty to compare the evidence and ultimate decision to "the findings" we believe leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as to the administrative agency's basis for decision.
>
> Our ruling in this regard finds support in persuasive policy considerations . . . As stated by the United States Supreme Court, the "accepted ideal . . . is that 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.' (S.E.C. v. Chenery Corp. (1943) 318 U.S. 80, 94.)". . . .

In this case, the expert report submitted by Dr. Fabrikant provided three alternative methods to demonstrate that Mr. Van Alstine was not receiving a fair return on his investment. (AR 844-858). In his decision, the hearing officer did not discredit those three alternative methods. (A-72). In addition, the hearing officer did not find Dr. Fabrikant was biased, or otherwise unqualified to render an

opinion. (A-35 through A-74). Rather, the hearing officer found that Mr. Van Alstine had not submitted sufficient evidence to overcome the "presumption" in the City's ordinance. (A-73). Because the hearing officer found that Mr. Van Alstine had not submitted sufficient evidence to rebut the presumption, the hearing officer found that Mr. Van Alstine was making a fair return *under the "presumption."* (A-73 and A-74).

If the hearing officer had "found" that Dr. Fabrikant was biased or otherwise unqualified, the hearing officer would have been required to provide reasons for such findings. If the hearing officer had provided such reasons, Mr. Van Alstine would have been entitled to demonstrate that such findings were not supported by substantial evidence. Again, however, the hearing officer did not make any such findings regarding Dr. Fabrikant. (A-35 through A-74).

Similarly, if the hearing officer had found that the three theories offered by Dr. Fabrikant were flawed, the hearing officer would have been required to provide reasons for those findings. Again, however, the hearing officer did not discredit any of the three theories offered by Dr. Fabrikant, let alone make "findings" that could be challenged under the substantial evidence test.

To the contrary, the hearing officer, the Rent Review Board and the Riverside County Superior Court all "found" that Mr. Van Alstine had not submitted sufficient evidence to rebut the "presumption" in the City's ordinance and therefore failed to consider any of the theories submitted by Dr. Fabrikant. Although the Court of Appeal ruled that Mr. Van Alstine did in fact submit sufficient evidence to rebut the presumption, the Court of Appeal did not remand the proceedings to the administrative agency to make findings based on the evidence that was submitted.

Instead, the Court of Appeal found that the Board "could have" found that Dr. Fabrikant's testimony was "biased" or otherwise improper. (A-23). The Court of Appeal then made its own findings, unilaterally rejected Dr. Fabrikant's testimony and concluded that the 8.19% return the Van Alstines were receiving when they filed their application was fair. (A-23 through A-26). Because the Court of Appeal acted contrary to law, Mr. Van Alstine respectfully requests this court to grant this petition, so that the matter may ultimately by remanded to the administrative agency with instructions to make "findings" regarding the evidence that was submitted, which "findings" can then be tested under the "substantial evidence" rule.

CONCLUSION

The "presumption" in the City of Palm Desert's ordinance violates due process, because it arbitrarily assumes that adjusting a property owner's 1982 net operating income for 50% of the increase in the inflation rate will result in a fair return in all future years. The decision to deny Mr. and Mrs. Van Alstine a rent increase also violates due process, because it is based on the rejection of uncontradicted and unimpeached expert testimony and because it results in the setting of a rate of return that is not supported by any expert testimony regarding rates of return.

Respectfully submitted,

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September 12, 2003

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Supreme Court, U.S.
FILED

03 438 SEP 16 2003

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

Ray Van Alstine, dba
Palm Desert Mobile Estates
Petitioner and Appellant,

v.

The City of Palm Desert and
the Palm Desert Rent Review Board,
Respondents and Appellees.

The Tenants Residing at Palm Desert Mobile Estates
Real Parties in Interest.

On Petition for Writ of Certiorari
to the California Supreme Court

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Court of Appeal, Fourth Appellate District, Division Two - No. E031714
S115282

IN THE SUPREME COURT OF CALIFORNIA

En Banc

RAY VAN ALSTINE, Plaintiff and Appellant,

v.

THE CITY OF PALM DESERT, et al., Defendants and Respondents.

Petition for review DENIED.

Supreme Court
Filed
June 18, 2003
Frederick K. Ohlrich Clerk

Deputy

GEORGE
Chief Justice

NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

Filed
March 14, 2003
Court of Appeal - Fourth District

RAY VAN ALSTINE, Plaintiff and Appellant, v. CITY OF PALM DESERT, et al., Defendants and Respondents.	E031714 (Super Ct. No. 016791) OPINION
BEN AKERS, et al., Real Parties in Interest and Respondents.	

APPEAL from the Superior Court of Riverside County.

Charles E. Stafford, Judge. Affirmed.

Anthony C. Rodriguez for Plaintiff and Appellant.

Best, Best & Krieger and Douglas S. Phillips for Defendants

and Respondents. No appearance for Real Parties in Interest.

The owner of a mobilehome park applied for leave to impose a rent increase under the City's rent control ordinance. When the City denied his application, he petitioned the trial court for a writ of administrative mandate. He appeals from the trial court's judgment denying his petition. Finding no error, we affirm.

BACKGROUND

A. THE RENT CONTROL ORDINANCE AND GUIDELINES

The City of Palm Desert (City) adopted a rent-control ordinance for mobilehome parks in 1983, which as subsequently amended was codified as chapter 9.50 of the Palm Desert Municipal Code.[1] The Ordinance establishes a rent review board (§ 9.50.040; Board) and authorizes it to adopt rules to implement the Ordinance (§ 9.50.050, subd. F). Among the rules adopted by the Board are the Guidelines for Hardship Rent Increases (Guidelines).

The Ordinance provides that no mobilehome park owner

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[1] We shall refer to chapter 9.50 of the City's municipal code as the Ordinance. Unless otherwise identified, all section references are to the Ordinance.

may raise the rents in a park mor e than once per year, and that the increase may not exceed the sum equal to three-quarters of the increase in the Consumer Price Index (CPI) for the preceding 12 months times the existing monthly rent. (§ 9.50.060; mandatory rent increase.) However, an owner may petition the Board for permission to impose a "hardship increase" -- i.e., and increase greater than that allowed by section 9.50.060 -- on the ground that a lesser increase would create a hardship for the owner. (§ 9.50.070; subd. A.)

In ruling on a petition for a hardship increase, the Board's guiding principle is that rents should "be established at a level which will provide landlords with a fair return on their property..." (Guidelines, § 100.) The Guidelines establish a presumption "that the net operating income [NOI] produced by a property during the base year [1982] provided a fair return on property" during that year. (*Ibid.*) They also establish a presumption that if the owner has imposed a mandatory rent increase authorized by section 9.50.060 and if the owner's current NOI is equal to the owner's NOI in 1982 plus 50 percent of the increase in the CPI since 1982 (Guidelines, § 101, subd. A), then the owner is receiving a fair

return (*id.*, subd. B). Accordingly, if an owner's NOI is below that benchmark, the Board must grant a hardship increase to the extent necessary to raise the owner's current NOI to that level. (*Id.*, subd. A; mandatory hardship increase.)

On the other hand, if an owner's NOI is at or above that level, and thus beyond the level of a mandatory hardship increase, then the owner must affirmatively demonstrate that he or she is entitled to a discretionary hardship increase. Specifically, subdivision B of section 101 of the Guidelines provides in relevant part that "a landlord [is] entitled to present evidence and arguments to the Board in support of a discretionary hardship application rebutting this presumption. Interested third parties may also attend the hearing and present evidence and arguments against the landlord. Acknowledging that what constitutes a fair return on property is debatable, the Board may consider any and all evidence or arguments it deems relevant to valuing the landlord's property such that the result is in conformity with existing laws and operates to prevent a confiscatory taking. Relevant methods for valuing a landlord's property may include, but are not limited, to the following: [¶] 3. Comparable Sales [¶] 4. Replacement Cost

[¶] 5. Original Investment [¶] If a landlord successfully rebuts the presumption that the mandatory rent increase provided by Palm Desert Municipal Code Section 9.50.060 and the hardship rent increase authorized by subdivision A of this section of the guidelines provides the landlord with a fair return on his or her property, or for other good and sufficient reasons [,] the Board may award the landlord a discretionary rent increase in the amount the Board deems necessary to achieve a fair return."

B. THE APPLICATION FOR A HARDSHIP INCREASE

In 1997, Ray Van Alstine, the owner of a mobilehome park in Palm Desert known as Palm Desert Mobile Estates, applied for a discretionary hardship increase pursuant to Guidelines section 101, subdivision B, on the ground that it was necessary to obtain a fair return. The tenants of the park opposed the application. For reasons not pertinent to this appeal, the matter was not heard by the hearing officer appointed by the Board until 1999.

Following an evidentiary hearing, the hearing officer made proposed findings of fact and recommended that Van Alstine's application be denied. The Board subsequently adopted those findings and that recommendation. In particular, the Board found

that Van Alstine had failed to "rebut the presumption" that he was receiving a fair return, affirmatively found that he was "receiving a 'just and reasonable' return on his property," and denied his application for a discretionary hardship increase.

C. THE PETITION FOR WRIT OF MANDATE

In 2000, Van Alstine petitioned the trial court for a writ mandate, directing the Board to grant his application for a hardship increase in declaring the Ordinance unconstitutional. The trial court denied the petition in 2002. Van Alstine appeals.

CONTENTIONS

Van Alstine contends that the presumption is unconstitutional, that the Board erred in concluding that he had not rebutted the presumption, and that the Board's finding that he was receiving a fair return is not supported by substantial evidence.

ANALYSIS

A. THE PRESUMPTION IS NOT ARBITRARY

As noted above, the Guidelines presume that, if the rent provided a fair return 1982, and if the rent is increased by 75 percent of the increase in the CPI since 1982 and is further increased to the extent necessary to raise the owner's NOI by 50 percent of

the increase in the CPI since 1982, then the owner will still receive a fair return today. Van Alstine contends that the Guidelines' presumption that those rent increases will result in a fair return in arbitrary.

A legislative presumption of one fact from evidence of another is arbitrary and constitutes a denial of due process unless there is a rational connection between the fact proved and the ultimate fact presumed. (*Tot* v. *United States* (1942) 319 U.S. 463, 467-468 [87 L. Ed. 1519, 1524]; *Mobile, J. & K. C. R. Co.* v. *Turnipseed* (1910) 219 U.S. 35, 43 [55 L. Ed. 78, 80]; *People* v. *Wells* (1949) 33 Cal. 2d 330, 346.) There is sufficiently rational connection if it can be said with substantial assurance that , if the proved fact is true, then the presumed fact is mor likely than not to be true as well. (*Ulster County Court* v. *Allen* (1979) 442 U.S. 140, 165, 166, fn. 28 [60 L. Ed. 2d 777, 797]; *Leary* v. *United States* (1969) 395 U.S. 6, 36 [23 L. Ed. 2d 57, 82].) "'The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of [the legislative body] to amass the stuff of actual experience and cull

conclusions from it.'" (*Usery* v. *Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 28 [49 L. Ed. 2d 752, 774], quoting *United States* v. *Gainey* (1965) 380 U.S. 63, 67 [13 L. Ed. 2d 658, 662].)

The determination of what constitutes a "fair" or "just and reasonable" return in a particular situation involves a balancing of the interests of the regulated investor against those of the tenants and general public for whose benefit the regulations were enacted. (*Galland* v. *City of Clovis* (2001) 24 Cal. 4th 1003, 1026; *Kavanau* v. *Santa Monica Rent Control Bd.* (1997) 16 Cal. 4th 761, 771.) On one hand, the "'rate of return must be high enough to encourage good management including adequate maintenance of services, to furnish a reward for efficiency, to discourage the flight of capital from the rental housing market, and to enable operators to maintain and support their credit. A just and reasonable return is one which is generally commensurate with returns on investments in other enterprises having corresponding risks. On the other hand, it is also one which is not so high as to defeat the purposes of rent control nor permit landlords to demand of tenants more than the fair value of the property and services which are provided.' [Citation.] thus, '[t]he rate of return permitted may not be as high

as prevailed in the industry prior to regulation nor as much as the investor might obtain by placing his capital elsewhere.' [Citation.] Finally, '[c]onstitutional provisions do not require that rent control ordinances allow landlords to recover all increases in their operating expenses; they require only that the landlord be permitted to obtain a just and reasonable return.'" (*Oceanside Mobilehome Park Owners' Assn.* v. *City of Oceanside* (1984) 157 Cal. App. 3d 887, 907; accord, *Galland*, p. 1021; *Kavanau*, pp. 772, 783 & 785.) Because is spans the spectrum between a confiscatorily low rate that defeats the purposes of rent control, a fair rate of return describes a broad zone or range of potential returns rather than a single, precise figure. (*Galland*, pp. 1021-1022, 1026; *Kavanau*, p. 784; *San Marcos Mobilehome Park Owners Assn.* v. *City of San Marcos* (1987) 192 Cal. App. 3d 1492, 1502-1503.)

Weighing those competing interests and satisfying those various criteria is not a task within common experience. To the contrary, it is a matter requiring expert knowledge and expert judgment. (*Galland* v. *City of Clovis, supra,* 24 Cal. 4th at p. 1021; *Whispering Pines Mobile Home Park, Ltd.* v. *City of Scotts Valley* (1986) 180 Cal. App. 3d 152, 160.) Nor is that expertise within the special

competence of the judiciary. Therefore, the evaluation fo the rationality of the presumption of fair return is an empirical one that we are not competent to make in an evidentiary vacuum. (*Usery* v. *Turner Elkhorn Mining Co., supra,* 428 U.S. at p. 28 [49 L. Ed. 2d at p. 774].)

Legislative acts adjusting the burdens and benefits of economic life carry a presumption of constitutionality. (*Usery* v. *Turner Elkhorn Mining Co., supra,* 428 U.S. at p. 15 [49 L. Ed. 2dat p. 766].) "[T]he burden is on one complaining of a due process violation to establish the legislature has acted in an arbitrary and irrational way." (*Ibid.*) To overcome the deference we owe to the legislative decision to enact presumptions like that at issue here, it is incumbent upon the person challenging that decision to offer evidence demonstrating that, as a matter of fact, the presumed fact is not more likely than not to be true when the preliminary facts are true.

Van Alstine did not satisfy that evidentiary burden. Although he asserts that the presumption "was picked out of thin air with no evidentiary support whatsoever," he offers no evidence to support that assertion. Nor does he cite us to any evidence in

the record that tends to show that the presumption is irrational, i.e., is not more likely than not to be true.

Van Alstine did offer evidence that the presumption is false in his case. (See part C., *infra.*) But no court has ever "required that a presumption be accurate in every imaginable case." (*Ulster County Court* v. *Allen, supra,* 442 U.S. at p. 155, fn. 14 [60 L. Ed. 2d at p. 791].) The fact that it is not true in *all* cases does not preclude it from being true in *most* cases, and thus rational. That a presumption can be rebutted does not render it arbitrary.

In his reply brief, Van Alstine argues that the presumption is arbitrary because "it is a mathematical certainty that adjusting 'base year' profits for anything less than 100% of the increase in the inflation rate will ultimately result in the confiscatory taking of property, with the only variable being how long the confiscatory process will take." We are not persuaded, for several reasons.

First, the CPI does not necessarily represent the actual rate by which the owner's expenses increase from year to year. Second, as already noted above, the constitutional requirement of a fair return does not necessarily mean that owners must be permitted to recover all increases in their operating expenses. (*Oceanside*

Mobilehome Park Owners' Assn. v. *City of Oceanside, supra,* 157 Cal. App. 3d at p. 907.) And third, even if we agree with Van Alstine's assertion in the abstract, the issue before us is not whether the presumption will be accurate for eternity, but only whether it is more likely than not to be true *today.* He has presented no evidence from which we may conclude that the presumption is presently unreasonable.

In summary, Van Alstine has failed to demonstrate that the presumption is arbitrary.

B. THE PRESUMPTION IS NOT REQUIRED TO CONSIDER ALL FACTORS BEARING ON FAIR RETURN

Van Alstine contends that a rent control board must consider all relevant factors when considering an application for a rent increase, and that the presumption violates that standard because it considers only NOI and the effect of inflation. But even assuming that his premise is correct, his conclusion fails. Because the presumption is rebuttable rather than conclusive, neither the Ordinance nor the Guidelines preclude the Board from considering other factors that influence a fair return. To the contrary, the Board is required to admit and consider all relevant evidence that an

applicant for a discretionary hardship increase wishes to offer. (§ 9.50.070, subds. E & W.)

The correct test for determining whether a rent-control scheme is unconstitutional on its face is whether "'its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties.'" (*Fisher* v. *City of Berkeley* (1984) 37 Cal. 3d 644, 679.) That test is not met here. Because the presumption is not conclusive, it does not prevent the Board from avoiding a confiscatory result in the event that the rents that *presumably* result in a fair return do not *actually* result in a fair return. To the contrary, the Guidelines specifically authorize the Board to "award the landlord a discretionary rent increase in the amount the Board deems necessary to achieve a fair return" whenever the presumption has been rebutted or for any "other good and sufficient reason[]. . . ." (Guidelines, § 101, subd. B.) When, as here, the standards and procedures adopted by the government entity 'afford[] the Board sufficient flexibility to avoid confiscatory results, we must uphold the ordinance." (*Fisher*, p. 682.)

Accordingly, Van Alstine has failed to demonstrate that the

Ordinance and its Guidelines are unconstitutional.

C. VAN ALSTINE PRODUCED SUFFICIENT EVIDENCE TO REBUT THE PRESUMPTION THAT HE WAS RECEIVING A FAIR RETURN

As noted above, the Board found that "[t]he park owner did NOT rebut the presumption of Guidelines § 101.B that the MNOI [i.e., maintenance of net operating income] method provides him with a fair return on his property." The Board is mistaken.

The Guidelines expressly state that the presumption to which the Board referred - i.e., that the mandatory rent increases permitted by section 9.50.060 and the mandatory hardship rent increases authorized by Guidelines section 101, subdivision A, are presumed to provide a park owner with a fair return on his or her property - is a rebuttable presumption. (Guidelines, § 101, subd. B; and see Evid. Code § 602.) "Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof." (Evid. Code, § 601.)

This presumption is not a presumption affecting the burden of proof because it is not "a presumption established to implement some public policy other than to facilitate the determination of the

particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves of their property to the administration of others." (Evid. Code, § 605.) Therefore, it is a presumption affecting the burden of producing evidence. (*Id.*, §§ 601 & 603.)

The presumption is not evidence that may be weighed against conflicting evidence. (Evid. Code, § 600, subd. (a).) Instead, "[t]he effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence without regard to the presumption." (*Id.*, § 604.)

The evidence introduced by Van Alstine included the following facts.[2] Van Alstine purchased the Palm Desert Mobile

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[2] These facts are derived from the statement of facts in Van Alstine's opening brief, because the real parties in interest – the tenants – have not filed a brief. Although the Board has (continued...)

Estates, a 144-space mobilehome park, in 1978 for $1,550,000. Between 1978 and 1997, Van Alstine invested the additional sum of $757,901 in the form of capital improvements.

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[2] (...continued)
filed a respondent's brief, it addresses only Van Alstine's challenge to the constitutionality of the City's Ordinance. No brief has been filed that disputes Van Alstine's assertion that the Board's findings are not supported by substantial evidence.

"'Although it is the appellant's task to show error, there is a corresponding obligation on the part of the respondent to aid the appellate court in sustaining the judgment.'" (*California State Employees' Assn* v. *State Personnel Bd.* (1986) 178 Cal. App. 3d 372, 382, fn. 7, quoting what is now 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 612, p. 644; accord, *Mosher* v. *Johnson* (1921) 51 Cal. App. 3d 114, 116.) That is particularly true regarding challenges to the sufficiency of the evidence. In such cases, the respondent should identify the evidence that supports the material findings. (Cf. *Burns* v. *Renaker Co.* (1931) 116 Cal. App. 139, 140.) If a respondent is unwilling to search the record for evidence to support a challenged finding, it should not expect an appellate court to do so without its assistance. If a respondent fails to file a brief, "the court will decide the appeal on record, the opening brief, and any oral argument by the appellant." (Cal. Rules of Court, rule 17(a)(2).) In particular, the court may accept as true the statement of facts in the appellant's brief. (Advisor Com. com., Cal. Rules of Court, rule 17(a).)

By extension, when the respondent files a brief that defends the validity of its ordinance but does not either dispute the appellant's statement of facts or otherwise defend the findings upon which the administrative decision in favor of the real parties in interest depends, and the real parties decline to file any brief at all, we need to make an independent study of the accuracy of the appellant's statement of facts.

In July of 1997, Van Alstine applied to the Board for a discretionary hardship increase of $52.93 per space per month. He argued that an increase in that amount was necessary to provide him with a fair rate of return on his inflation-adjusted investment. When the hearing on his application was delayed until 1999, he amended his application to request an increase of $67.30 per month.

At the hearing, Van Alstine introduced the oral testimony and written report of Dr. Richard Fabrikant, an economist with a M.B.A. degree from the Wharton Graduate School of Finance and a Ph.D. in economics from the University of California at Santa Barbara who regularly testifies concerning rates of return on mobilehome parks. Fabrikant opined: that Van Alstine's investment in the park was properly measured by adding the capital improvements of $757,901 to the initial purchase price of $1,550,000; that when adjusted for inflation through the end of 1998, that investment totaled $4,537,038; that, considering all relevant factors, especially the risk involved in that business, a fair rate of return on that inflation-adjusted investment was 10.4 percent; that to achieve that rate of return, Van Alstine would need a net operating income of $471,852 per year; that his actual net

operating income for 1998 was only $371,583; and that to make up the difference of $100,269 per year, the monthly rent for each space would need to be increased by $58.03 per month.

By introducing evidence of these facts, Van Alstine carried his burden of producing evidence sufficient to support a finding that the presumed fact - that he was receiving a fair return - did not exist. At that point, the presumption of a fair return was rebutted and ceased to have any effect on the issues before the Board. The Board's finding that he failed to rebut the presumption is incorrect.

D. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S AFFIRMATIVE FINDING THAT VAN ALSTINE WAS RECEIVING A FAIR RETURN WITHOUT A HARDSHIP INCREASE

1. We Review the Board's Factual Findings for Substantial Evidence.

The Ordinance requires that, whenever an owner files a petition for a hardship increase, an evidentiary hearing be conducted (§ 9.50.070, subd. J) and factual findings made (*id.*, subds. O-Q). Accordingly, judicial review of the Board's decision is

conducted pursuant to a petition for administrative mandate. (Code Civ. Proc., § 1094.5, subd. (a).) The trial court may review the administrative decision to determine "whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was nay prejudicial abuse of discretion. Abuse of discretion is established is the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Id.*, subd. (b).) Van Alstine argues that the evidence does not support the Board's findings.

"Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5, subd. (c).) When reviewing the decisions of a rent-control board, a trial court is not authorized by law to exercise its independent evaluation of the

evidence. (*Concord Communities* v. *City of Concord* (2001) 91 Cal. App. 4th 1407, 1413-1414.) Accordingly, the substantial evidence test applies in this instance. (*Id.*, p. 1414.)

In applying that test, the trial court must consider all relevant evidence in the administrative record, including evidence that contradicts or otherwise tends to undermine the evidence supporting the agency's decision. (*County of San Diego* v. *Assessment Appeals Bd. No. 2* (1983) 148 Cal. App. 3d 548, 554-555.) In an appeal from the trial court's ruling on the petition, the scope of our review is generally identical to that of the trial court. *Bixby* v. *Pierno* (1971) 4 Cal. 3d 130, 149.)

2. Uncontradicted Evidence is Not Conclusive.

Van Alstine repeatedly emphasizes that neither Dr. Fabrikant's opinion testimony nor the evidence of the preliminary facts upon which his opinion was based (such as the amount of his initial investment, his subsequent capital improvements, and his NOI) were contradicted at the hearing. The implication that he apparently wishes the court to draw is that the evidence is therefore finding on the Board. If so, he is mistaken.

The trier of fact determines "the effect and value of the

evidence addressed to it, including the credibility of witnesses. . . ." (Evid. Code, § 312, subd. (b).) So long as the trier of fact does not act arbitrarily, it may reject all or any part of the testimony of any witness that it finds to be incredible, even if that testimony is uncontradicted. (*Foreman & Clark Corp.* v. *Fallon* (1971) 3 Cal. 3d 875, 890.) "This rule is applied equally to expert witnesses." (*Ibid.*)

That general rule is subject to a narrow exception. "[W]hen the matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen, the expert evidence is conclusive." (*Engelking* v. *Carlson* (1939) 13 Cal. 2d 216, 221; accord, *Huffman* v. *Lindquist* (1951) 37 Cal. 2d 465, 473; *Osborn* v. *Irwin Memorial Blood Bank* (1992) 5 Cal. App. 4th 234, 277; *Huber & Nichols, Inc.* v. *Moore* (1977) 67 Cal. App. 3d 278, 313.) But that exception is limited to the type of cases in which it arose, i.e., to professional-negligence cases in which the applicable standard of care is solely within the knowledge of experts and can only be proved by their testimony. (*Howard* v. *Owens Corning* (1999) 72 Cal. App. 4th 621, 631-632; *Conservatorship of McKeown* (1994) 25 Cal. App. 4th 502, 508-509.)

There being no issue here of the standard of care governing

a professional, that exception does not apply. Therefore, the Board as the finder of fact was free to reject Van Alstine's uncontradicted evidence so long as it did not act arbitrarily. For instance, any uncontradicted witness, lay or expert, may be disregarded to the extent that the finder of fact decides that the witness is biased or otherwise not credible. (Evid. Code, § 780.) Uncontradicted expert testimony may also be rejected if the trier of fact finds that one or more of the facts upon which the expert's opinion is based have not been proven by the proponent of that opinion or have been disproved by the opposing party. (*Howard* v. *Owens Corning, supra,* 72 Cal. App. 4th at p. 633; *Lysick* v. *Walcom* (1968) 258 Cal. App. 2d 136, 156.) The trier of fact may also discount the expert's opinion if it finds the reasons for that opinion to be persuasive. (*People* v. *Prince* (1988) 203 Cal. App. 3d 848, 858.)

Because we do not presume error, it is Van Alstine's burden to demonstrate that the Board rejected his expert's testimony arbitrarily rather than for any of the possible reasons just listed. He has not done so. Accordingly, we cannot say that the Board erred by declining to adopt the uncontradicted evidence.

3. The Board's Finding That Van Alstine Was Receiving

a Fair Return Is Supported by Substantial Evidence.

The evidence indicates that Van Alstine earned NOI in the sum of $371,583 in 1998, $137,075 more than the NOI to which Van Alstine is guaranteed through applications for mandatory hardship increases. That is a 109 percent increase over his 1982 NOI of $177,725. By contrast, during the same period the CPI increased by less than 67 percent. Moreover, Van Alstine made a profit every year since he purchased the park, and his net income has steadily risen over time. Based on the inflation-adjusted value of the total investment, his 1998 NOI represents a "real" rate of return -- i.e., the rate of return beyond that necessary to overcome the effects of inflation - of 8.19 percent.

This income stream has not discouraged Van Alstine from maintaining his park. His own appraiser opined that the park was in "average to good condition." Nor has the level of income prevented Van Alstine from making substantial improvements to his park. To the contrary, in 1996 alone he made capital improvements in excess of $702,000. And despite the existence of rent control, the fair market value of the park has increased from $1.55 million to $4.8 million.

This is substantial evidence supporting the Board's factual finding that, even without a discretionary hardship increase, the return being generated by the park was within the broad range of returns that are fair and not confiscatory.[3]

Noting that a landlord is entitled to a fair return, not only on the initial purchase price, but also on any subsequent capital improvements (*Kavanau* v. *Santa Monica Rent Control Bd., supra,* 16 Cal. 4th at p. 773; *Sierra Lake Reserve* v. *City of Rocklin* (9th Cir. 1991) 938 F. 2d 951, 958), Van Alstine contends that, at the very least, he is entitled to a discretionary hardship increase in an amount sufficient to amortize and provide a return on the $702,000 in capital improvements made in 1996. But those capital expenditures were an integral part of the evidence before the Board and thus were presumably considered by the Board in determining that Van Alstine was already receiving a fair return. There being no

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[3] "For those price-regulated investments that fall above the constitutional minimum, but are nonetheless disappointment to investor expectations, the solution is not constitutional litigation but, as with nonregulated investments, the liquidation of the investments and the transfer of capital to more lucrative investments." (*Galland* v. *City of Clovis, supra,* 24 Cal. 4th at p. 1026.)

indication in the record that the Board excluded them, there is no showing of error.

DISPOSITION

The judgment is affirmed. The respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
J.

We concur:

/s/ Hollenhorst
Acting P. J.

/s/ Richlj
J.

104/PALMDSRT/APPENDIX.101

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Attorneys for Respondents THE CITY OF PALM DESERT AND THE PALM DESERT RENT REVIEW BOARD

SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE

RAY VAN ALSTINE, dba, PALM DESERT MOBILE ESTATES, Petitioner, v. THE CITY OF PALM DESERT, THE PALM DESERT RENT REVIEW BOARD and DOES 1-500, inclusive, Respondents.	Case No. INC 016791 Judge: Honorable Charles E. Stafford, Jr. JUDGMENT DENYING PETITION FOR WRIT OF MANDATE [C.C.P. § 1064] Trial Date: January 11, 2002 Time: 8:30 a.m. Dept: "2F"

THE TENANTS RESIDING AT PALM DESERT MOBILE ESTATES, et al.,

Real Parties in Interest.

This cause came on regularly for hearing before this court on January 11, 2002 in Department 2F, Judge Charles E. Stafford, Jr. presiding, pursuant to the Verified Petition of Ray Van Alstine, dba Palm Desert Mobile Estates. Anthony C. Rodriguez appeared as attorney for Petitioner. Douglas S. Phillips, Deputy City Attorney, appeared as attorney for Respondents. No appearance was made on behalf of the real parties in interest.

The cause having been argued and submitted for decision, the Court being fully advised, a statement of decision not having been requested, and the Court having issued its tentative decision contained in that Minute Order dated January 11, 2002, a copy of which is attached hereto as Exhibit "A," and the Court having directed that judgment and a preemptory writ of mandate should not issue in the cause;

IT IS ORDERED, ADJUDGED AND DECREED that the Preemptory Writ of Mandate applied for herein is DENIED.

Dated: March 13, 2002

_____

Honorable Charles E. Stafford
Judge of the Superior Court

APPROVED AS TO FORM:

Dated: February ___, 2002

_____

Anthony C. Rodriguez
Attorney for Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

TITLE:	DATE & DEPT	NUMBER
Ray Van Alstine v. City of Palm Desert	1/31/02 2F	INC016791

COUNSEL	REPORTER
None	None

PROCEEDING
Ruling on Submitted Matter (January 11, 2002)

On January 11, 2002, this Court presided over the hearing on Petitioner's Petition for Writ of Administrative Mandamus. Petitioner was represented by Attorney Douglas S. Phillips. After hearing arguments from both sides, the matter was taken under submission.

After thorough and complete review of petitioner's Petition, Memorandum of Points and authorities, Exhibits, Lodged Federal authorities, and Reply, Respondents' Opposition, Memorandum of Points and Authorities, and Exhibits, and the Administrative Record, this Court renders the following ruling:

RULING

Petitioner's Petition for Writ of Mandate is DENIED.

CONSTITUTIONAL ISSUES

"To withstand facial constitutional scrutiny, rent control laws must avoid confiscatory results and thus must provide a mechanism for ensuring landlords a 'just and reasonable' return on their property." *Birkenfeld* v. *City of Berkeley*, 17 Cal. 3d 129, 165

(1976); *Donohue* v. *Santa Paula West Mobile Home Park*, 47 Cal. App. 4th 1168, 1177 (1996). An ordinance will be facially valid so long as it grants the responsible agency discretion to provide a fair return by approving rent increases in extraordinary cases. *Donohue* v. *Santa Paula West Mobile Home Park*, (supra) at 1179.

In this case, Petitioner advances the FAIR RETURN ON VALUE standard, while Respondent sides with the FAIR RETURN ON INVESTMENT standard. The Palm Desert ordinance is based on the maintenance of net operating income (MNOI) approach, which has been approved by every published court decision that has considered the issue. *Cotati Alliance for Better Housing* v. *City of Cotati*, 148 Cal. App. 3d 280, 288 (1983). There is no constitutional requirement that rent control laws yield landlords a fair return on the market value of their property. . . ." *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 208-310. "Applying a return on value measure risks contravening the very purpose for rent control: use of a return on value standard would thoroughly undermine rent control, since the use of uncontrolled income potential to determine value would result in the same rents as those which would be charged in the absence of regulations. . . Rent control using this standard is not rent control at all! *Fisher* v. *City of Berkeley*, 37 Cal. 3d 644, 680 (1984) *fn* 33 quoting *Cotati Alliance for Better Housing* v. *City of Cotati*, 148 Cal. App. 3d 280, 287 (1983).

Petitioner simply advocates the fair return on value approach, without showing that the Palm Desert NOI approach fails to provide Petitioner with a just and reasonable return on his investment. While the ordinance and guidelines presume the present control NOI represents a fair return on a mobilehome park owner's property, the guidelines also provide a method for owners to rebut the presumption simply arguing for a new standard. Petitioner has failed to show that, as applied, the Palm Desert ordinance is unconstitutional.

THE SNOWBIRD ISSUE

Petitioner has failed to show how CCP § 798.21(a) does not adequately address this issue. Code of Civil Procedure § 798.21 is

controlling.

BIAS

In this case, with perhaps the exception of the hearing officer's reading the old file, the basis of Petitioner's bias claim was know to Petitioner in time to raise it before the City. Accordingly, any claim of bias based upon those grounds has been waived. As to the hearing officer's reading the old file, that one fact does not show actual bias. In fact, he denies that relied on it. (Administrative Record 1277). There must be a showing of actual bias, rather than just the appearance of bias. *Andrews* v. *ALRB*, 28 Cal. 3d 781 (1981).

CONCLUSION

Petitioner has simply failed to establish that application of the Palm Desert ordinance and guidelines have failed to provide him with a just and reasonable return on his property. His Petition for Writ of Mandate is, therefore, without merit.

Dated: 1/31/03

Charles E. Stafford, Jr., Judge

Palm Desert Rent Review Commission

FINAL DECISION OF THE PALM DESERT RENT REVIEW COMMISSION

RE: PALM DESERT MOBILE ESTATES' PETITION

FOR DISCRETIONARY HARDSHIP INCREASE

FILED JULY 29, 1997

WHEREAS, on July 29, 1997, Palm Desert Mobile Estates filed a Petition for a Discretionary Hardship Increase; and

WHEREAS, following an Evidentiary Hearing, the hearing officer's proposed findings with respect to Palm Desert Mobile Estates' Petition was filed with the City Clerk on November 10, 1999; and

WHEREAS, pursuant to Section 9.50.070, Palm Desert Mobile Estates petitioned for a review of that decision by the full Rent Review Board on November 23, 1999; and

WHEREAS, on January 6, 2000, the Palm Desert Rent Review Commission conducted a public hearing and heard arguments by the parties based upon the materials submitted to it by the hearing officer; and

WHEREAS, at the conclusion of the hearing on the proposed findings and recommended decision of the hearing officer, the Palm Desert Rent Review Commission accepted and confirmed the recommendation of the hearing officer and adopted the hearing officer's findings and recommendations.

NOW, THEREFORE, the Palm Desert Rent Review Commission decides as follows:

1. The proposed findings of fact and recommended decision of the hearing officer on the "discretionary hardship' Petition for Rent Increase by Palm Desert Estates dated November 5, 1999 and filed with the Palm Desert City Clerk on November 10, 1999, is hereby adopted by the Commission without change, which findings are:

(a) The park owner did NOT rebut the presumption of Guidelines § 101 .B that the MNOI method provides him with a fair return on his property;

(b) The park owner is receiving a "just and reasonable" return on his property;

(c) The issue of part-time-residence -- and whether they are included in our Rent Control Ordinance -- is determined by Palm Desert City Ordinance § 9.50.030.D and California Civil Code § 798.21(a).

2. The Petition for Discretionary Hardship Rent Increase is hereby DENIED.

NOTICE

NOTICE IS HEREBY GIVEN that judicial review of this final decision must be brought within ninety (90) days, pursuant to California Code of Civil Procedure § 1094.6(B). This notice is given pursuant to California Code of Civil Procedure § 1094.6(F).

DATED: January 28, 2000

WILLIAM J. AD~MS, Chairman
Palm Desert Rent Review Commission

PALM DESERT RENT REVIEW COMMISSION

PROPOSED FINDINGS OF FACT AND RECOMMENDED DECISION

OF THE HEARING OFFICER

ON THE "DISCRETIONARY HARDSHIP" PETITION FOR RENT INCREASE BY PALM DESERT MOBILE ESTATES

(OCTOBER 1999)

THE MOBILEHOME PARK

Palm Desert Mobile Estates is a 144-space mobilehome park located at 43-101 North Portola Avenue in Palm Desert, California. It is owned by Mr. and Mrs. Ray Van Alstine who purchased it in July 1978 for $1,550,000 (with $100,000 downpayment). The park has some very nice amenities including a clubhouse, swimming pool and spa, shuffleboard courts and attractive landscaping. The clubhouse contains a stage, kitchen area, billiards room, activity room and a small library. There are private laundry facilities and RV storage area. The park consists of predominantly single–wide mobilehomes (approximately 104 singlewides and 40 doublewides). About 38 percent of the spaces at the park are rented to people who do not live

at the park on a full-time basis.

This application is for a "discretionary" hardship rent increase. The park owner admits that he is making more than the city's' Maintenance of Net Operating Income (hereinafter MNOI) theory would allow -- but he claims that, nevertheless, he is not receiving a fair return on his investment.

THE PALM DESERT RENT REVIEW GUIDELINES

The Rent Review Commission's Guidelines were amended in December 1992, by commission resolution. The resolution amended Section 101 of the Rent Review Guidelines. It kept the MNOI provision (at 50% of increase in CPI) and added paragraph B which created a presumption that the MNOI method enables landlords to "receive a fair return on their property." Subsection B allows a landlord to rebut that presumption with evidence and arguments. The subsection does not specifically state what evidence a landlord must present to rebut the presumption.

POSITION OF THE APPLICANT

In this petition, the landlord admits that he is currently charging more rent than he would be entitled to under the MNOI method, but not as much as he would under the "Inflation-Adjusted

Investment" method. He claims that he is not getting a fair return on his property.

The Park Owner's approach to proving that he is not getting a fair return on his property is called the "Inflation – Adjusted Investment" method. It is a "return on value" analysis. The "value" is the original cost of the park which is then adjusted for inflation. The analysis proceeds as follows:

1. Take the park owner's original investment ($1,550,000) and adjust it for the inflation between the date of purchase and the current year of application (that inflation-adjusted value is $4,500,000);

2. Compute the real interest rate being generated by "similar investments" -- 10.4%;

3. Apply that interest rate to the inflation-adjusted value of this park -- which yields the amount he claims he must receive in order to get a fair return on his property ($4,500,000 x 10.4% = $480,000 per year);

4. Subtract what the actual income was in the most recent year ($480,000 – $365,000 = $115,000) -- which represents the shortfall between a "fair return" and his ACTUAL return;

5. Adjust for vacancies ($2.34 per space reduction) and the

effect of utilities (adjustment not precisely defined in per-space/month dollars);

6. Divide the result by the number of spaces in the park and the number of months in the year. The result is the amount of monthly increase per space;

7. Compare the new amount to rents in similar parks to make sure that the new rent is not "excessive" or "gouging";

8. The argument is that everyone's constitutional rights are protected: The Park Owner gets a "fair return" on his property and there are no excessive rents;

9. As a fall-back position, if this "return on inflation-adjusted investment" theory is not adopted, then:

A. the park owner requests that he be compensated for the capital improvements to the streets, electrical system and sewer system; and,

B. Those spaces occupied by winter residents ("snow birds") and people who are renting their mobilehomes to third parties should be excluded from rent controls because the City has no legitimate interest in protecting a vacationer's second home or the space

rent for him to lease a mobilehome to someone else.

POSITION OF THE RESIDENTS

The tenants' (hereinafter Mobilehome Owners) position is:

1. The MNOI method adopted by the City (and approved by the courts) provides the Park Owner with a fair return and it contains solutions to The Park Owner's main concerns;

A. The issue of inflation is adequately addressed by the provision in our ordinance that the Park Owner may increase his net operating income by 50 percent of the increase in the consumer price index;

B. The issue of compensation to the park owner for his capital improvements is taken care of by the MNOI provisions of the ordinance allowing a park owner to amortize those as expenses over the reasonable life of the improvement;

2. The "snowbird" issue is handled by state law (California Civil Code section 798.21(a) which states in relevant part: "(I)f a mobilehome space within a mobilehome park is not the principal residence of the homeowner and the homeowner has not rented the mobilehome to another party, it shall be exempt from any

ordinance ... adopted by any City ... which establishes a maximum amount that the landlord may charge a tenant for rent." There are additional conditions in the following subsections.

The landlord presented evidence that he purchased the mobilehome park in 1978 for $1,550,000.00 (with $100,000.00 down). Since that time, he made an additional $757,000.00 in capital improvements. He argued that if you take these figures and adjust for inflation, the value of his investment in today's dollars is about $4.6 million. Testimony showed that a fair rate of return on an investment of $4.6 million in this mobilehome park is about 10.4 percent. This would equate to a per-space rent increase of $58.03 per month (actually the requested per-space rent increase had a wide range -- from $40 to $85 -- throughout the hearing but $58.03 is the figure argued in Park Owner's closing brief and that is the figure that will be discussed).

Mobilehome Owners' attorney argued that corrections for the effect of inflation are made automatically in the MNOI method (that 50% of the increase in CPI) so there is no need to switch to some other method and complain about a lack of "fair return" on property. Besides, if the park owner were allowed to do a theoretical analysis

and charge the highest rents of any comparable investment then reasonable rent control would cease to exist.

Under our guidelines the Park Owner is entitled to a "discretionary" hardship increase ONLY if he can rebut the presumption that the MNOI method gives him a fair rate of return. The critical question before the Hearing Officer and ultimately the Rent Review Commission is whether the park owner is constitutionally entitled to receive the income determined by the "Inflation-Adjusted Method" -- and if he can show that he is NOT getting an income determined by that method it establishes that he is not getting a "fair rate of return" sufficient to overcome that presumption.

A customary approach by a park owner who is seeking a rent increase is to place a very high value on his park through a variety of methods and then apply an income percentage to it to show how much he should be receiving. This is the "return on value" analysis. Some of the methods of placing a value on the park have been disapproved by the courts (such as the Fair Market Value Method which is admittedly circular -- as rents increase the market value

increases which justifies another rent increase which causes the market value to increase -- on and on). Our ordinance adopts several methods which can be used to value a park owner's property. Those methods do not specifically include the "Inflation-Adjusted Method" but the list is not exclusive and if it is determined that this method is appropriate then there is no reason why it could NOT be used.

One of the legal issues before the Commission is what type of evidence needs to be produced to prove that the MNOI method does not give the Park Owner a fair rate of return on his property? A "just, 'fair and reasonable return" is the standard applicable to all rent control schemes. It has been defined in numerous court cases. The case of Oceanside Mobilehome Park Owners' Assoc. v. City of Oceanside (1984) 157 Cal.App.3d 887, 204 Cal. Rptr. 239 defined a just, fair and reasonable return as: "...sufficiently high to encourage and reward efficient management, discourage the flight of capital, maintain adequate services, and enable operators to maintain and support their credit status. However, the amount of return should not defeat the purpose of rent control to prevent excessive rents."

Despite this definition, the courts continue to struggle with the meaning of the "just, fair and reasonable" return standard. The Court

in Carson Harbor Village, Ltd. vs. City of Carson Mobilehome Park Rental Review Board 70 Cal App 4th 281, 82 Cal Rptr. 2d 569 (1999) notes that "at least one court has deemed the term "fair return" incapable of precise decision (with citations).

SUMMARY OF TESTIMONY TO THE HEARING OFFICER

The park owner, Ray Van Alstine, testified:

In 1960 he was a broker selling mobile homes. In 1973, he was the broker who sold this park to his predecessor owners. In 1978, he bought the park for $1,550,000.00. At the time he purchased the park, he had no intention to immediately raise rents and did not immediately do so. At the time the park was built, decisions were made with regard to the utilities, particularly the sewer, the electricity and the streets. Mr. Van Alstine was not involved and had no~input to those decisions. In 1996 he borrowed money against the mobile home park and completed a capital improvement project that provided new sewer connections, upgraded electricity connections and he put in new streets with a concrete channel down the center for water drainage. The total expenditures in 1996 were $700,060.00. He provided some details with regard to the financing.

On cross examination, Mr. Van Alstine indicated that he has

sold or listed approximately 100 mobile home parks during his Real Estate career. He indicated that after 1978 it was more difficult to obtain listings on mobile home parks because of the effect of rent control. He indicated that he retired from mobile home park sales in 1986 and has only been acting as an investor since that time. He has investments in nine other mobile home parks and this park is the only one that he owns exclusively. He has small partnerships with his interests being any where from 4% to 50% in the other nine parks. He acquired those parks mostly after the date he purchased Palm Desert Mobile Estates and he considers them good investments.

Mr. Van Alstine indicated that he made a down payment of $100,000.00 in cash at the time he bought Palm Desert Mobile Estates. He has made payments on the underlying loans but could not recall taking money "out of his pocket" and putting it into the operation of the mobile home park. In 1996, Mr. Van Alstine was able to take $180,000.00 out of the park as his profit.

Referring to the tax returns attached to his application, he acknowledged payments to him from the park as follows:

1996 – $180,000.00,

1995 – $224,000.00,

1994 – $207,800.00,

1993 – $194,680.00,

1992 – $151,000.00,

1991 – $170,000.00,

1990 – $166,000.00,

1989 – $108,000.00.

He acknowledged that in the ten year period from 1989 through 1998, he took out approximately $1,700,000.00. He indicated that he felt he was not getting a fair return because after inflation, the value of the park had substantially gone up.

Mr. Van Alstine indicated that prior to the capital improvements that were made in 1996, the park had substantial problems with the sewer system. The septic tanks had to be pumped out with great frequency and the park provided a service to treat the septic tanks to help them stay in better condition. On occasion, they would have to replace individual septic tanks, and finally the authorities would not allow him to replace the septic tanks. He indicated that the expenses for that purpose prior to 1996 made it very expensive. After the park was connected to the City sewer in 1996, it saved all the money that had previously been paid to maintain, repair

and pump the various septic tanks.

In the first ten years of Mr. Van Alstine's ownership of the park, he spent $512.00 for capital expenditures. In the next eight years, (1988-1996), the park made various capital improvements to maintain the buildings and streets.

Mr. Van Alstine indicated that there are between thirty and forty doublewide mobile homes in the park which would mean there were 104 singlewide mobile homes. He indicated park policy is to allow singlewide mobile homes to replace singlewides when they leave and doublewides to replace doublewides. He was not aware of any comparable parks, that is with two-thirds of the spaces being singlewides and one-third of the spaces being doublewide.

Mr. Van Alstine believed that the last extraordinary rent increase the park received was $28.00 per space, per month, about six or seven years ago and an additional $5.00 per space, per month the following year. These increases were negotiated between the park owner and the mobile home owners.

Mr. Van Alstine acknowledged that he did not take any money out of his own pocket to pay the balance of the loan that he had to take out to purchase the mobile home park. That loan was paid

basically from the earnings of the park. He indicted that the agreed rent increases five or six years ago were necessary because of the risk of maintaining the property and to maintain good relationships with the residents. He indicated that he increases the rent every year based on 75% of the increase of the Consumer Price Index, all in accordance with the City's ordinance.

The applicant's next witness was Richard Fabricant.

Mr. Fabricant is a Business Financial Economist and Consultant. He has a Ph.D. in Economics from the University of California at Santa Barbara in 1975. In 1967, he received a Masters Degree in Business Administration and Finance from the University of Pennsylvania, School of Finance and Commerce. In 1965, he received a Bachelor's in Science and Management Engineering at Vincelere Polytechnic Institute in Albany. From 1988 to the present, he has been a consultant and in 1983 started his own Company which is essentially an Engineering company. In 1995, that Company merged with a larger Company called Watlow. In 1980, he had another Company called Opti Corp. and he is still operating that Company. He designed software to analyze and work with portfolios with a specialty in options trading. He has recently started another

Company called Cylectics, which is a Software Research Company. He was an Associate Assistant Professor at the University of Denver and from 1975 to 1980 was a Fullbright Scholar and taught overseas both in Australia and Iran. He also taught at the University of California at Riverside.

He currently does various types of Business Consulting including Business Reorganizations and Restructuring. He also contracts for studies with cities and private investors, particularly in the property development area. He has done 7 or 8 studies regarding rates of return in mobile home parks and has experience with the Palm Desert Rent Control Ordinance in two cases. One being the present case and the other one being in regard to the Silver Spur Mobile Home Park.

Mr. Fabricant's opinion is that Mr. Van Alstine, the owner of Palm Desert Mobile Estates is not receiving a fair rate of return. He indicated that a fair rate of return on the inflation adjusted value of the mobile home park would be 10.4%. Based on that analysis he came up with several different rent increases, which were different based on whether or not his analysis included or excluded revenues, expenses and capital costs associated with utilities. He also did different

analyses based on different time periods. Those rent increases ranged from a $45.00 increase per space per month to an $82.00 per space per month increase. The basic difference between the higher figure and lower figure in this range was whether or not you include the past years, during which the park owner was not receiving a fair return, (which would be the higher figure), or whether or not you just analyzed the current year, (which would be the smaller recommended increase). He indicated that as each year passed, the park owner would actually get more and more behind in terms of the amounts that he should be receiving.

Mr. Fabricant spoke about the decision people make as to whether or not to invest in a particular investment. Every investor has his own concept of the risk that he is willing to take and that some investors have very small risk tolerance and others have a big risk tolerance. He also indicated that there are different types of risk. One would be a financial risk and another might be a business risk. He indicated every investor incorporates some element of risk in an investment and then decides what rate of return he needs to compensate for taking those risks. Of course, in making such an investment and electing to assume such risk, there is no guarantee

that the investor is going to make the rate of return he would like. He indicated that it would be irrational for someone to invest $100,000.00 if he thought that his investment would increase at less than the rate of inflation. He indicated there is a positive correlation between the amount of risk that someone is willing to take and the rate of return they would expect on an investment. Also, inflation factors into a decision to make an investment because the higher the inflation, the greater amount of return will be needed to compensate for the loss of purchasing power as a result of the inflation. If the inflation is high, interest rates for a particular investment will always be high and when inflation is low, the interests rates drop.

He indicated that in analyzing the investment for Palm Desert Mobile Estates, it would be necessary to analyze the investment contemporaneously: In other words -- as adjusted for inflation. The theoretically correct approach in analyzing such an investment would be to take the amount of the original investment and adjust it for the impact of inflation. It would also be theoretically acceptable to take the current net operating income and adjust that backwards into 1978 dollars in looking at the real rate of return. It would be inappropriate to look at the investment in 1978 dollars and look at the return in 1996

dollars.

There are other factors that influence rates of return. One of them is diversification. When an investment is diversified, it means that there are various types of securities or investments that would have the effect of reducing the total risk. For example, if one part of the investment were to go up, another part of the investment may go down and there is usually a lesser rate of return connected with an asset that is diversified. A mutual fund would be an example of a diversified investment. Another example of a diversified investment would be a Real Estate Investment Trust (hereinafter "REIT" -- pronounced "reet"). A REIT is a combination of different real properties, much like a mutual fund. There are REIT's that deal with shopping centers, REIT's that deal with medical facilities, residential facilities and there are REIT's that deal strictly in various mobile home parks. If you buy a REIT unit, you do not buy a particular mobile home park, but you buy a portion of numerous mobile home parks that may be in 15-20 different states.

Liquidity is also an element that impacts rate of returns. If an investment is more liquid, it is easier to convert into cash and the greater the liquidity, the lower the risk of that investment and so the

lower the rate of return. For example, money market funds are very liquid and therefor, the rates or return on those types of investments are very low. However, if you were to purchase a piece of real property, it is not as easy to convert into cash and therefor the liquidity is less and an investor would require a higher rate of return on that kind of an investment.

The need for personal management of an investment impacts the rate of return for that particular investment. If it is necessary for an investor to take personal control of his investment, then he is taking a business risk and it would be appropriate for that investment to have a higher rate of return.

Personal liability is also an element that impacts risk and therefor the rate of return. Personal liability is your financial risk in the sense that your risk could actually go beyond the amount that you have invested and effect other aspects of your financial life: For example, if some event happened that resulted in a judgment against the investor. Of course as the possibility of personal liability increases, the amount of risk increases and the rate of return that an investor in such an asset would expect would increase.

Usually, the elements of taxes and depreciation are not taken

into consideration in valuing an investment or analyzing the potential rate of return of such an investment. Mr. Fabricant analyzed investment strategies that would take into consideration the effect of taxes and depreciation. The reason these elements are not taken into consideration, of course, is that different investors may have different financial structures so that a particular investment's tax and depreciation could effect them differently which would effect the desirability of a particular investment.

For the same reason, Mr. Fabricant indicated that the financing of a particular investment is usually not taken into consideration in determining what a fair rate of return is. For this reason, he indicated it would be theoretically incorrect to take the down payment and calculate a rent increase based merely on the down payment. The proper method would be to take the amount of the purchase price and adjust it for inflation and calculate the amount of the rate of return that would be applicable. Also analyzing an investment based on the amount of the down payment would result in substantial differences in the amount of a rent increase depending on whether or not the investor put a small percentage down as opposed to paying cash for the property. This could result in vastly different rents for properties

of the same basic value.

Mr. Fabricant indicted that rates of return change over time. You might see higher rates of return in one period and lower rates of return in another. In determining the rate of return that would be appropriate in this particular case, Mr. Fabricant used two methods:

1. The first method was to look at mobile home park REIT's that are publicly traded and determine what the returns are for an investment if you bought a unit in those;

2. The second way of doing it is to see what happens with a risk free investment and then add back the risk to it to determine an appropriate rate of return on a mobile home park.

He acknowledged that this second method is a difficult method because each mobile home park may have different elements of risk. So, it is theoretically impossible to come up with an exact number for a particular mobile home park. Making this second analysis, Mr. Fabricant took a 30 year U.S. Treasury Bond which was a risk free investment.

In his analysis regarding mobile home REITs or mobile home mutual funds, Mr. Fabricant analyzed two REITs. One is exclusively in California and the other was mostly in Florida and the South and

Midwest. These REIT5 are diversified and liquid. They require no personal management and they have no potential for personal liability to the investor beyond the amount that he or she chooses to invest. Because of these elements, an investment such as Palm Desert Mobile Estates, should have a rate or return actually greater than the REITs.

Mr. Fabricant indicated that the rate of return that would be expected is 10.4% if you take the inflation out of the equation. If you put anticipated future inflation back in, it is 12.6%. The reason for this is because if you assume there is going to be more inflation in the future, it is necessary to add an additional amount of risk in analyzing the current applicable rate of return. That additional inflation component is around 2-2½ percent. Mr. Fabricant also indicated it would be necessary to include capital improvements that were made since the purchase of the park and to adjust those for inflation also.

Mr. Fabricant indicated that his rate for doing this kind of consulting work was $125.00 per hour. He charges $160.00 per hour for testifying. He also charges for travel time.

Mr. Fabricant introduced his report entitled, "FAIR RATE OF RETURN ON INVESTMENT AND RENT ADJUSTMENTS FOR PALM DESERT MOBILE ESTATES", dated April 23, 1999 and

continued testifying on direct examination with regard to the report. He indicated that in his opinion, Mr. Van Alstine, the owner, would have required a return of $457,000.00 in 1996 and $471,862.00 in 1998. Mr. Fabricant analyzed the application of the MNOI formula to this particular investment. He indicated that the ~OI method only adjusted for 50% of the inflation rate and eventually results in a confiscation or diminishing of returns.

The maximum that the Maintenance of Net Operating Income theory would award Mr. Van Alstine would be $234,000.00 per year. Under the theory Mr. Fabricant testified to, he should be receiving $450,000.00. It was comparing these two that caused Mr. Fabricant to conclude that the park owner is not getting a fair rate of return on his investment.

He computed the return based on three approaches:

1. The first approach applies a present value analysis by realigning all data to comparable current dollar values.

2. The second approach involved the derivation of a risk adjusted rate of return on investment.

3. The third approach is a look-forward method which considers the future value of Palm Desert.

Mr. Fabricant's report is a very scholarly explanation of determining comparative rates of return on investments. He defines "a fair rate of return" differently than the various court definitions. In his report, he indicates "a fair rate of return on a prospective investment is that rate of return which, at a minimum, provides the investor with an equivalent market rate of return after taking into account the unique risks connected with that investment". He makes a point of indicating that inflation and risk MUST be considered and interest, tax depreciation and amortization must NOT be considered.

Mr. Fabricant defines the nominal rate of return as the market rate return unadjusted for inflation. The real return on an investment is the investor's gain and purchasing power after accounting for inflation.

Mr. Fabricant's report discusses financial risk and business risks which he defines. The substance of this is that as risk of an investment increases, the expected rate of return should also increase. Mr. Fabricant compared the rate of return earned by a real estate investment trust. He noted that these REITs are both diversified and liquid, which the mobile home park in question here is not. The rate of return in 1998 was 6.4% and in 1996 was 6.08%. This formula

indicated that the rate of return that the investors require for similar investments would be the combination of the dividend yield and the expected rate of dividend growth. Those terms were not fully defined in his report, but his conclusion after adding the yield and the growth rate and adjusting for expected growth over the next five years, was 16.39%. Thus, an investor with current money investing in such a REIT would expect to receive 16.39% in a combination of dividend yield and growth of the investment. An alternative method of deriving this same figure would be to take historical sum of the rate of growth and share value and add that to the dividend yield to come up with an overall rate of return of 13.79%.

Another method of deriving a rate of return that an investor would require is to take a government bond rate and add in the "risk premium". The risk premium is that amount of additional return on investment necessary to compensate the investor for unique business risks and general market risks connected with this specific investment. The combination of these factors for the years 1998 and 1996 would result in an average of 13.2% long term fair rate of return for a diversified stock portfolio.

The average of the two methods analyzed by Mr. Fabricant

provide a minimal fair rate of return for the Palm Desert mobile home park investment of 12.67%. The real rate of return is derived by subtracting the long run inflation rate which is anticipated to be 2.3% from the nominal rate resulting in a 10.4% real rate of return.

In his data analysis and inflation alignment section, Mr. Fabricant provided several graphs and tables showing the financial operation of Palm Desert Mobile Estates. In analyzing the real rates of return as they currently stand, Mr. Fabricant concludes that the park owner is receiving 8.37% in 1996 dollars. He should be receiving 10.4% based on the comparison of what the park owner would be receiving had he invested in the particular mobile home park REIT that was analyzed. The difference between the two dollar amounts, (based on 144 spaces in the park), would result in a $52.70 per space monthly increase in 1996 dollars and $66.85 per space monthly increase in 1998 dollars. Those same figures, excluding the money made by utilities, would be $43.72 and $58.03 per month per space increase. After analyzing his three methods of determining the proper rate of return and consolidating those figures, Mr. Fabricant provide his opinion that for the owners of Palm Desert Mobile Estates to receive a fair return on their investment, the per month space rent should increase

by $58.03 per space per month if the effects of utilities are excluded from the analysis.

In response to questions from the Hearing Officer, Mr. Fabricant acknowledged that the inflation adjusted value of the mobile home park which he has calculated is not necessarily the amount that the owner could receive if he were to sell the park today. In making the inflation adjustment, he is putting a value on the investment rather than a value on the park.

In response to questions from the Hearing Officer, Mr. Fabricant indicated that this theory that is being used to establish the threshold question that the park owner is not getting a fair rate of return is by looking at what other similar investments could earn if the park owner had that amount of cash now and could invest in those other investments.

Mr. Fabricant acknowledged that his method of calculating the appropriate rate of return that the park should be receiving, he was not able to value the landlords property in any of the five ways specifically itemized for discretionary hardship increases in accordance with the rent review guidelines. Those five methods are:

1. present fair market value;

2. Capitalization of income;

3. comparable sales;

4. Replacement costs;

5. Original investment.

In effect, Mr. Fabricant has taken one of those five, the "original investment" method and adjusted it upward to reflect inflation. He indicated that the five methods are not clearly defined and are not exclusive. Mr. Fabricant acknowledged that a key element in his conclusion that the park owner is not getting a fair rate of return is that his inflation adjusted method uses 100% of the inflation over time, whereas the City's Ordinance only provides a 75% inflationary increase. He indicated that he was not aware of any decisions by courts that would require the use of 100% of the Consumer Price Index. He was aware that the Palm Desert Ordinance, which uses 75% on an annual basis to adjust rents, has been upheld in court. Mr. Fabricant indicated that while he had inflation-adjusted the original price of the mobile home park, at no place had he used inflation to adjust the $1,400,000.00 financing package. His justification for that was his belief that the mortgage has nothing to do with this analysis. He acknowledged that two of his three methods of analyzing the fair

rate of return involved the analysis of a particular REIT and that the REITs came into existence in the 1990's and were not available for potential investment at the time the park owner bought this particular mobile home park.

The cross examination of Mr. Fabricant ended at 5:00 p.m. without being completed.

Mr. Gerald Taylor was called and sworn and testified:

Mr. Taylor is a Real Estate Appraiser and Consultant. He attended Questa Community College in San Luis Obispo and California Polytechnic College in San Luis Obispo. He has an AA degree in Business from Western College. He worked in the Assessor's Office in Santa Barbara County in 1962 and was an Assistant Vice President and Chief Appraiser for San Luis Obispo Savings and Loan from 1965 through 1973. In 1974, he joined the firm of Schenberger, Taylor, Mccormick & Jecker. He has been involved in the appraisal of mobile home parks and mobile homes since 1970. He has written a book which was published and marketed nationally entitled "Mobile Home Appraisal Guide For Appraisers". He is a member of the Society of Real Estate Appraisers and has taught courses in mobile home appraisal throughout the United States. He

has testified at Rent Control Hearings, City Council Meetings and as an expert witness in numerous law suits. He is certified as an appraiser in Arizona, Nevada and California and had done work in all three of those states plus Oregon and the state of Washington. He estimates that he has appraised hundreds of mobile home parks, mostly in California. He has worked in the Coachella Valley on several occasions and has testified a number of times in Palm Desert in Rent Control proceedings. Mr. Taylor presented his report entitled "MARKET RENT ESTIMATE of PALM DESERT MOBILE ESTATES ALL-AGE MOBILEHOME COMMUNITY".

Mr. Taylor's fee for field work is $135.00 an hour. For depositions and court testimony it is $250.00 an hour. He has also prepared market rent surveys throughout the state.

He read the definition of "market rent"-- it is "the rental income that a property would most probably command on an open market as indicated by current rentals being paid for comparable space as of the date of the appraisal." This is preferred terminology to the term economic rent which is traditionally being used in appraisal analysis. He defined "gouging"--"excessive rent" and he indicated that market rents change over time.

Mr. Taylor indicated that a "market rent survey" is a procedure which takes comparable and competing mobile home communities, ascertains the rent levels, and compares them to the subject mobile home park to make an estimate of market rent. He indicated that there are numerous winter residents who reside in the Coachella Valley and there are other areas in the state where "snow birds" are found.

Mr. Taylor indicated that he has prepared a market rent survey for Palm Desert Mobile Estates. As of March 1997, he concludes that the market space rent average should be $350.00 per month including water, trash and sewer. He explained how he added in and adjusted the issues of water, trash and sewer. His final figure was that the market rent is $322.00 average per space at palm Desert Mobile Estates. If the water, trash and sewer were added back in, which it is in this case, a fair market rental should be $350.00. He indicated that he used 7 comparable parks. He indicated that he has been in the park 15-20 times over the last 10 or 12 years. Mr. Taylor went over his market analysis report explaining how he rated each of the elements of the park as poor, fair, average, good or excellent. At the time he did his survey, the actual average rent was $310.00 so the

differential between the actual rent and his estimate of the market rent was $40.00 per space .per month. Mr. Taylor used a variety of comparable parks which he then adjusted f or the differences in amenities. Some of the parks he looked at had vacant spaces which he indicated is not unusual in mobile home parks with mostly elderly tenants.

On examination by the Hearing Officer, Mr. Taylor acknowledged that in none of his comnparables is there a park with as great a percentage of singlewide mobilehomes as Palm Desert Mobile Estates. He acknowledged that a singlewide space would necessarily rent for less than a doublewide space if the size of the space was different. He acknowledged that Palm Desert Mobile Estates was an older park where most of the pads were set up for singlewides, although it was his belief that most of them would take doublewide mobilehomes.

On cross examination, Mr. Taylor acknowledged that in the Coachella Valley, he has not worked for any resident groups or mobilehome owners. His assignments have always been for a lender, a bank, a rent control hearing or for market rental surveys and they were all done for owners or management firms of mobilehome park

communities. In other words -- the landlord. He denied, however, that this would cast any bias on his method of appraising the properties themselves.

Mr. Taylor acknowledged that with rent control there is not really a "free and open market" as that term is defined in textbooks. Mr. Taylor indicated he had not been aware of the state law dealing with "snow bird" mobile home spaces. (Civil Code Section 798.21)

On further examination by the Hearing Officer, Mr. Taylor acknowledged that if he were to find that the average space rent for singlewide coaches was less than the average space rent for doublewides, it would cause him to believe that his conclusions as to the appropriate amount of rent for the spaces should be modified (downward). This would mean that his estimate of the fair rental figure would be reduced below the $350 per space per month. The exact reduction was not specified.

Exhibit 4 (a list of the mobilehome spaces with the amount of rent each pays and the size of the mobilehome as of January 1997) shows 103 singlewide mobilehomes paying an average of $273.23 per month and 35 doublewide mobilehomes paying an average of $310.76 per month.

The Park Owner called Mr. Rich Elias to testify.

Mr. Elias is employed by the management firm of Bessire & Casenhiser, Inc. of Walnut, California. He has worked there for 12 years and is the vice president and director of property management. That firm manages approximately 52 mobilehome parks. Two of their parks are in the Coachella Valley, Palm Desert Mobile Estates and Safari Park in Palm Springs. He has worked for Carlsberg Management Company where he was a regional property manager overseeing 17 different projects. For Palm Desert Mobile Estates his job is to oversee the day-to-day operations of the park, hire and fire employees and give them overall direction. He prepares the annual budget and reviews monthly income and expense statements and communicates with the park owner. He oversees the on-site' manager who in turn directs the daily maintenance of the property. He directs the installation of any capital improvements.

This park uses his standard rental agreement which contains the rules and regulations, which they call "community guidelines". A document entitled "Rules and Regulations" was marked as an exhibit. Those guidelines would allow any homeowner to remove his current mobilehome and install a new one. He testified that most spaces in the

park will take a 20-foot wide mobilehome but some spaces will not take a 24-foot wide.

Mr. Elias discussed the capital improvements made in 1996. He itemized the improvements and indicated that their total cost was $702,060.

The mobilehome park was built in the early '60s. It is now 35 to 40 years old. The original life expectancy was 20 years. He indicated that this translates to the possibility of vacant spaces in the future if the infrastructure is not kept up. He believes there will need to be more upgrades to the electrical system, the water distribution system and continuous improvement and repair to the roads. Also, some of the mobilehomes have gone through their estimated useful lives and many of them are going to need to be upgraded by the individual mobilehome owners.

Mr. Elias estimated that the park consisted of 36 percent snowbirds and people who are subletting their mobilehomes. Some people own three mobilehomes and are renting them out. One couple owns four.

On cross-examination, Mr. Elias testified:

His company's fee structure is on a sliding percentage: 5

percent of the first $25,000 in rents and then 3.5 percent of any rents above that figure. He acknowledged that the larger doublewide mobilehomes in the park sit on 55-foot wide lots while most of the singlewide mobilehomes are on 40 or 45-foot lots. With regard to those individuals who own mobilehomes and rent them out -- the amount of the space rent is controlled by our ordinance but the mobilehome owner can rent them out for whatever the market will bear.

The Mobilehome Owners called one witness, Attorney Prawdzik:

Mr. Prawdzik established his expertise as representing mobilehome owners. His "testimony" was primarily to interpret and argue the evidence that had already been introduced. Mr. Prawdzik introduced a 37-page document entitled "Guidelines For Rent Control Law Lessons of a Decade" a publication which discussed various aspects of the MNOI method of determining mobilehome space rents. He also introduced a variety of documents showing how much the park owner had taken out in profit over a ten-year period and how much he would have if he had taken that and invested it at various percentage rates. He introduced various photographs of the

mobilehome parks that Mr. Taylor, the appraiser, used as comparables. The point was that these parks were substantially different from Palm Desert Mobile Estates (usually better) and had a larger percentage of doublewide mobilehomes.

Following the conclusion of the evidentiary hearing, Mr. Fabricant was asked to submit a report to analyze the documents which were submitted by Mr. Prawdzik. That report was subsequently provided and will be marked as the last exhibit in order -- Number 41. Mr. Fabricant's supplemental memorandum was received and reviewed. His conclusions were that Mr. Prawdzik's exhibits were theoretically incorrect, misleading, illogical and failed to consider the impact of inflation on the return an investment should receive.

Thereafter the parties presented their final arguments and legal analyses in writing in accordance with a briefing schedule that was delayed because of vacations and prior commitments. The Hearing Officer has reviewed and considered the arguments and legal precedents contained therein.

DISCUSSION

I find that the applicant did NOT rebut the presumption that

the MNOI method provides him with a fair return on his property. Since he is already receiving more than the MNOI method would give him, I recommend that his application for a discretionary hardship rent increase should be DENIED.

The question is what evidence must be presented to rebut the presumption established by our guidelines. It must be MORE than the standard approach of placing a high value on the park and applying an interest rate which other investments are getting (the "return on value" standard). That method is not superior to the MNOI method for, among others, the following reasons:

1. The "inflation-adjusted" method arrives at a value of the mobilehome park -- but it is a purely theoretical and subjective value. It is unrelated to the amount the owner of the park could sell the park for. It is not money that he could invest now if he were to sell the park and pay taxes, etc.

2. The interest rate being received by "similar investments" goes up and down over the years. This year the "inflation– adjusted" method may show this park is not getting a "fair return". Next year those "similar investments" may not be earning well and this park -- with no more change than what other

people's investments are doing -- might be making a VERY satisfactory return.

3. The Courts of Appeal have repeatedly ruled that the "return on value" standard is NOT mandated in order for a rent control ordinance to pass constitutional muster. (Oceanside, supra)

By comparison, the MNOI method is consistent over time. It has repeatedly been approved by the courts of appeal. It is capable of objective determination by use of the real income and expense figures.

This is not to say that the "inflation-adjusted" method (or other methods which apply a percentage rate against the value of all park) is incorrect, or is not a way to measure a park owner's entitlement to a rent increase. But, it is insufficient, by itself, to rebut the City's presumption that the MNOI method provides the park owner with a fair rate of return.

The park owner did not provide any other testimony showing that he was not earning a "fair rate of return" on his property. Such testimony might have been (looking at the Oceanside definition of fair rate of return): That the park owner was not earning enough to encourage and reward efficient management; That the park owner was dissatisfied with this investment because it was not providing

him with a high enough return~That he was not earning enough to provide adequate services to the park; That he was having trouble paying his bills. None of this type of evidence was presented, however, leading the trier of fact to conclude that Mr. Van Alstine has a pretty good investment here but it currently is not making as much as it might if it is analyzed under this particular "inflation-adjusted" return-on-value standard.

The MNOI method provides the park owner with reimbursement for his capital expenditures. Capital expenditures are amortized over their useful life and the yearly portion charged as an operating expense. Even with this procedure being followed the park owner is making substantially more than he would be allowed under the MNOI method.

The question of "snowbirds" (ie. the City's regulation of rents for spaces occupied by part-time residents) is handled by California Code of Civil Procedure Section 798.21(a) and is not an issue that the Palm Desert Rent Review Commission should decide.

RECOMMENDED FINDINGS:

1. The Park Owner did NOT rebut the presumption of Guidelines section 101.B that the MNOI method provides him with

a fair return on his property.

2. The Park Owner is receiving a "just and reasonable" return on his property.

3. The issue of part-time residents -- and whether they are included in our rent control ordinance -- is determined by Palm Desert City Ordinance Section 9.50.030.D and California Code of Civil Procedure Section 798.21(a). The part time residents are subject to rent control.

DATED: 11/5/99

RESPECTFULLY SUBMITTED,

_____

JEFFREY S. R. PATTERSON

RESOLUTION NO. RRC-1

A RESOLUTION OF TUE PALM DESERT RENT REVIEW COMMISSION
AMENDING SECTION 101 OF THE RENT REVIEW GUIDELINES FOR
HARDSHIP RENT INCREASE

The Palm Desert Rent Review Commission **DOES HEREBY RESOLVE** as follows:

Section 1. That Section 101 of the Palm Desert Mobile Home Rent Review Guidelines for Hardship Rent Increases shall be amended to read as follows:

101. Allowable Rent Increases

A. Hardship Increases

Upon filing of an individual hardship petition by a landlord, the Commission shall permit hardship rent increases such that the landlord's net operating income in the base year will be increased by *50%* of the increase in the Consumer Price Index (CPI) over the base year. The increase in CPI shall be calculated by subtracting the CPI for December, 1982, from the CPI for the most recently reported month at the time of filing of the petition and dividing the resulting figure by the CPI for December, 1982.

B. Discretionary Hardship Increases

It shall be presumed that the rent increases allowed by Palm Desert Municipal Code Section 9.50.060 and the hardship increases allowed by Subdivision A of this section of the guidelines enable landlords to receive a fair return on their property. However, a landlord shall be entitled to present evidence and arguments to the Commission rebutting this presumption. Interested third parties may also attend the hearing and present evidence and arguments for or against

the landlord. Acknowledging that what constitutes a fair return on property is debatable, the Commission may consider any and all evidence or arguments it deems relevant to valuing the landlord's property such that the result is in conformity with existing law and operates to prevent a confiscatory taking. Relevant methods for valuing a landlord's property may included, but are not limited, to the following:

1. Present Fair Market Value
2. Capitalization of Income
3. Comparable Sales
4. Replacement Cost
5. Original Investment

If a landlord successfully rebuts the presumption that the mandatory rent increase provided by PALM Desert Municipal Code Section 9.50.060 and the hardship rent increase authorized by Subdivision A of this section of the guidelines provides the landlord with a fair return on his or her property, the Commission may- award the landlord a discretionary rent increase in the amount the Commission deems necessary to achieve a fair return.

C. Notification of Residents

Consistent with Section *.9.50.070* of the PALM Desert Municipal Code, a landlord seeking a hardship or discretionary hardship increase pursuant to this section of the guidelines shall attest in writing to the commission at the time his or her petition is filed that he or she has served on each affected resident written notice that the landlord is applying to the commission for a hardship or discretionary hardship rent increase. Said notice shall inform each affected resident where the petition may be obtained or reviewed and that they have a right to be present at the

hearing and present arguments or evidence to the Commission for or against the south increase. Landlords shall provide actual notice to all residents a minimum of fifteen (15) days in advance of the hearing date once it is set. Failure to comply with such notice requirements shall be grounds, in the Commission's discretion, for recision of any rent increase granted pursuant to this section of the guidelines.

Section 2. That the City Clerk shall forward a copy of this Resolution to the City Council for ratification.

PASSED, APPROVED and ADOPTED this 18 th day of December, 1992, at a duly noticed meeting of the Palm Desert Rent Review Commission, by the following vote, to wit:

AYES: Ainsworth, Coaxes, Wade-Maltais, & White
NOES: None
ABSENT: None
ABSTAIN: None

_____
RANDALL WHITE, CHAIRMAN

ATTEST:

_____
SHEILA R. GILLIGAN, SECRETARY

104/PALMDSRT/APPENDIX.101

(3)

No. 03-438

Supreme Court, U.S.
FILED
OCT 23 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RAY VAN ALSTINE, dba
PALM DESERT MOBILE ESTATES,

Petitioner,

v.

THE CITY OF PALM DESERT and
THE PALM DESERT RENT REVIEW BOARD,

Respondents,

THE TENANTS RESIDING AT
PALM DESERT MOBILE ESTATES,

Real Parties in Interest.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

RESPONDENTS' BRIEF IN OPPOSITION

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12 pp

QUESTIONS PRESENTED

QUESTION NUMBER ONE: UNDER THE CITY OF PALM DESERT'S RENT CONTROL REGULATIONS IT IS "PRESUMED" THAT ADJUSTING A LANDLORD'S 1982 NET OPERATING INCOME BY 50% OF THE INCREASE IN THE INFLATION RATE WILL RESULT IN A "FAIR RETURN" IN ALL FUTURE YEARS. IS SUCH AN EVIDENTIARY PRESUMPTION SO ARBITRARY THAT IT VIOLATES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION?

QUESTION NUMBER TWO: DOES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION PROHIBIT AN ADMINISTRATIVE AGENCY (OR A REVIEWING COURT) FROM REJECTING UNCONTRADICTED AND UNIMPEACHED EXPERT TESTIMONY REGARDING RATES OF RETURN ON INVESTMENT IN A PRICE REGULATED INDUSTRY, OR FROM UNILATERALLY ESTABLISHING A RATE OF RETURN THAT IS NOT SUPPORTED BY EXPERT TESTIMONY?

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I.

RESPONDENTS' BRIEF AS TO QUESTION NO. ONE

The first question presented by Petitioner is whether a rebutable presumption in a municipal rent control ordinance is so arbitrary that it violates the Due Process Clause of the Federal Constitution. Petition for Writ of Certiorari ("Pet.") at i. The Respondents respectfully urge this Court to deny the Petition with respect to the first question because, as discussed below, the case is guided by ample authority, which supports the decision below.

The City of Palm Desert (The City) adopted a rent-control ordinance for mobile home parks in 1983, which was codified as Chapter 9.50 of The Palm Desert Municipal Code (The "Ordinance"). The Ordinance establishes a rent review Board (Section 9.50.040; "Board") and authorizes the Board to adopt rules to implement the Ordinance (Section 9.50.050; subd. F). Among the rules adopted by the Board are guidelines for hardship rent increases ("Guidelines").

The Ordinance provides that mobile home park owners may automatically raise the rents in a park once per year, which increase may not exceed a sum equal to three-quarters of the increase in the consumer price index (CPI) for the preceding twelve months, times the existing monthly rent. (Section 9.50.060; "Mandatory Rent Increase.") An owner may also petition the Board for permission to impose a "hardship increase" greater than allowed by Section 9.50.060, on the ground that a "lesser increase would create a hardship for the owner." (Section 9.50.070, subd. A; "Hardship Increase.") The Guidelines provide that the Board should establish rents at a level that will

provide landowners with a fair return on their property. (Guidelines, Section 100.) The Guidelines establish a presumption that the net operating income [NOI] produced by the mobile home park property during the base year [1982] provided a fair return on property during that year. (Guidelines, Section 100.) The Guidelines also establish a presumption that if the owner has imposed mandatory rent increases authorized by Section 9.50.060, and if the owner's current NOI is equal to the owner's NOI in 1982, plus fifty (50) percent of the increase in the CPI since 1982 (Guidelines, Section 101, subd. A.), then the owner is receiving a fair return. (Guidelines, Section 101, subd. B.) If an owner's current NOI is below that level, the Board must grant a hardship increase to the extent necessary to raise the owner's current NOI to that level. If an owner's NOI is at or above that level, then the owner must affirmatively demonstrate entitlement to an additional increase. A landlord may present unlimited evidence and arguments to the Board in support of a discretionary hardship application rebutting the presumption. Interested third parties may also present unlimited evidence and arguments. The Board may consider any and all evidence or arguments it deems relevant to valuing the landlord's property such that the result conforms with the existing laws and does not result in a confiscatory taking. Relevant methods for valuing a landlord's property include, but are not limited to: comparable sales, replacement costs, or ordinary investments. If a landlord successfully rebuts the presumption, the Board may award the landlord a discretionary rent increase in the amount the Board deems necessary to achieve a fair return. (Guidelines Section101, subd. B.)

Mobile home rent control is a form of price control or rate regulation. Government efforts to impose price controls have been regularly upheld by this Court. *Munn v. Illinois*, 94 U.S. 113 (1877) (upholding railroad rate regulations); *Houston E.&W. Texas Ry. CO. v. United States*, 234 U.S. 342 (1914) (same); *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding minimum price for milk); *Sunshine Co. v. Adkins*, 310 U.S. 381 (1940) (upholding minimum price for coal); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage legislation); *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260 (1986) (upholding rent control against anti-trust challenge); *Yee v. Escondido, California*, 503 U.S. 519 (1992) (declining to address whether mobile rent control constitutes regulatory taking).

In *Yee*, supra, this Court rejected the claim that a mobile home rent control ordinance, which limited a landlord's ability to evict tenants and control the sale of mobile homes on its property, resulted in per se taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court emphasized that "where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of regulation or the extent to which it deprives the owner of the economic use of property suggest that the regulation has unfairly singled out the property owner to bear a burden that should borne by the public as a whole." *Id.* at 522-523 (*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)).

The Supreme Court of California has already fashioned rules to remedy confiscatory rent controls. (*Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4th 761 (1997)). The *Kavanau* court noted that "the economic judgments

required in rate proceedings are often hopelessly complex.... The Constitution is not designed to arbitrate these niceties." *Kavanau v. Santa Monica Rent Control Board,* 16 Cal.4th 761, 778 (1997), quoting *Duquense Light Co. v. Barasch*, 488 U.S. 299, 314 (1989).

The authorities support the decision below upholding the presumption. A legislative presumption of one fact from evidence of another is not arbitrary and does not constitute a denial of due process, where there is a rational connection between the fact proved and the ultimate fact presumed. (*Tot v. United States*, 319 U.S. 363, 467-468 (1942); *Mobile, J.&K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910); *People v. Wells,* 33 Cal.2d 330, 346 (1949). There is a sufficiently rational connection if it can be said with substantial assurance that, if the proved fact is true, then the presumed fact is more likely than not to be true as well. *Ulster County Court v. Allen*, 442 U.S. 140, 165, 166, n. 28 (1979); *Leary v. United States*, 395 U.S. 6, 36 (1969). Determining rationality is a highly empirical process, neither commonplace or within the judicial competence, and significant weight should be accorded to the capacity of the legislative body in its determination of rationality. *User v. Turner, Alkhorn Mining Co.*, 428 U.S. 1, 28 (1976).

Legislative acts adjusting the burdens and benefits of economic life carry a presumption of constitutionality. *User v. Turner Alkhorn Mining Co.*, supra, 428 U.S. at p. 15. The burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. (*Ibid*). The person challenging that decision must offer evidence demonstrating that, as a matter of fact, the presumed fact is not more likely to be true when the preliminary facts are true.

Although Petitioner offered evidence that the presumption was rebutted in his case, that does not make the presumption arbitrary in *all* cases. The presumption is rebutable, not conclusive. Neither the Ordinance nor the Guidelines preclude the Board from considering any other factors that influence a fair return. To the contrary, the Board is required to admit and consider all relevant evidence that an applicant for a discretionary hardship increase wishes to offer. (Section 9.50.070, subd. E&W.)

The standards and procedures adopted by The City of Palm Desert in this case afford the Board sufficient flexibility to avoid confiscatory results. Ample authority supports the finding that the evidentiary presumption in the Ordinance does not violate the Due Process Clause of the Federal Constitution.

II.

RESPONDENTS' BRIEF AS TO QUESTION NO. TWO

The second question presented by the Petitioner is whether uncontradicted expert evidence presented at an administrative hearing is always binding on an administrative agency decisionmaker (here the Board) or on a reviewing court.

The Court of Appeal gave full consideration to that question. The Court found that uncontradicted evidence is not necessarily conclusive on the finder of fact. The Court of Appeal correctly found that the Board, as the finder of fact, was free to reject uncontradicted evidence so long as it did not act arbitrarily. Ample California authority has held that uncontradicted expert testimony may be rejected if the trier of fact finds that one or more of the facts upon

which the expert's opinion is based has not been proven by the proponent of that opinion, or has been disproved by the opposing party. (*Howard v. Owens Corning*, 72 Cal.App.4th 621, 633 (1999); *Lyssek v. Walcom*, 258 Cal.App.2d 136, 156 (1968)).

Petitioner failed to show that in rejecting the Petitioner's expert's opinion, the Board acted arbitrarily. In rate-setting cases such as this one, where the issues are complex and within the competence of the Board, and not the courts, the Board may reject uncontradicted expert testimony. The new rule that Petitioner proposes would improperly restrict administrative agencies from making decisions within their field of expertise. Such a rule should not be adopted by this Court.

III.

CONCLUSION

The Petitioner protests two narrow aspects of the Respondents' rent control ordinance. Both aspects (and others) are a matter for the Respondents' body politic to address. This case presents a local concern that does not rise to the level of national significance and Constitutional importance appropriate for decision by this Court.

For all these reasons, the Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

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Respectfully submitted,

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